No. 14810

United States
Court of Appeals
for the Ninth Circuit

HAROLD HUTSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the District Court
for the Territory of Alaska
Fourth Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.–10-14-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

THEODORE F. STEVENS,
U. S. Attorney,
Box 111, Fairbanks, Alaska;

GEORGE M. YEAGER,
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PHILIP W. MORGAN,
Asst. U. S. Attorney,
Box 111, Fairbanks, Alaska,

Attorneys for Plaintiff and Appellee.

GEORGE B. McNABB,
P. O. Box 682, Fairbanks, Alaska,

Attorney for Defendant and Appellant.

In the District Court for the District of Alaska,
Fourth Judicial Division
No. 1946 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HAROLD HUTSON,
Defendant.

INDICTMENT

Count I.

The Grand Jury charges in Count I of this Indictment:

That on the 28th day of March, 1954, in the Fourth Judicial Division, District of Alaska, Harold Hutson feloniously had unnatural carnal copulation, by means of the mouth, with another person, to wit, Virginia Mead, contrary to the provisions of Section 65-9-10 of the Alaska Compiled Laws Annotated, 1949.

Count II.

The Grand Jury charges in Count II of this indictment:

That on the 28th day of March, 1954, in the Fourth Judicial Division, District of Alaska, Harold Hutson, as a part of the same transaction set forth in Count I of this Indictment, feloniously persuaded Virginia Mead, a child under the age of 18 years, to participate in an act, to wit, unnatural carnal copulation, by means of the mouth, which act manifestly tended to cause said child to become a delin-

quent child, contrary to the provisions of Section 65-9-11 of the Alaska Compiled Laws Annotated, 1949.

Dated at Fairbanks, Alaska, this 7th day of January, 1955.

A True Bill.

/s/ W. L. LAMON,
Foreman of the Grand Jury.

/s/ GEORGE M. YEAGER,
Asst. United States Attorney.

Witnesses before the Grand Jury:

Virginia Mead,

Marian W. Perry,

Frank B. Perry.

Presented Jan. 7, 1955. [1*]

[Title of District Court and Cause.]

MOTION FOR CONTINUANCE

Defendant moves for the entry of an order continuing the date fixed for the trial of the above-entitled cause for a term of ten (10) days for the following reason:

1. Defendant was confined in the City Jail on April 10, 1955, and was only released therefrom at approximately 5:00 p.m. on April 15, 1955. Although diligent effort was made, Defendant was only able to secure the services of counsel of his choosing at 3:00 p.m. on April 16, 1955.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

2. Defendant's attorney of record, R. J. McNealy, has never discussed the merits of Defendant's case with him or talked to any of the witnesses for Defendant who will be relied upon in defense of the charge pending against Defendant.

3. Defendant's case was set on for trial without the knowledge or consent of Defendant and the first information relative to such setting was brought to the attention of Defendant at approximately 2:30 p.m. April 15, 1955. With the exception of a short conference with Defendant's attorney of record at approximately 12:00 Noon, April 16, 1955, Defendant has not seen or consulted with said attorney of record since on or [3] about the 17th day of January, 1955.

That due to the short notice Defendant and counsel for Defendant will be unable to prepare for trial of the above-entitled cause until approximately April 28, 1955.

This Motion is based upon the affidavits of Defendant and George B. McNabb, Jr., which are attached hereto, marked Exhibits A and B, respectively, and made a part hereof.

Dated at Fairbanks, Alaska, this 18th day of April, 1955.

/s/ GEORGE B. McNABB, JR.,
Attorney for Defendant.

[Receipt of copy acknowledged.] [4]

EXHIBIT A

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Harold L. Hutson, being duly sworn upon oath deposes and says:

That he was confined in the City Jail on April 10, 1955, and was only released therefrom at approximately 5:00 p.m., April 15, 1955. Defendant's attorney of record, R. J. McNealy, has never discussed the merits of Defendant's case with him or talked to any of the witnesses for Defendant who will be relied upon in defense of the charge pending against Defendant. Defendant's case was set on for trial without the knowledge or consent of Defendant and the first information relative to such setting was brought to the attention of Defendant by the Fairbanks Chief of Police at approximately 2:30 p.m., April 15, 1955. With the exception of a short conference with Defendant's attorney of record at approximately 12:00 Noon, April 16, 1955, Defendant has not seen or consulted with said attorney since on or about the 17th day of January, 1955.

That at approximately 5:00 p.m. on April 15, 1955, [5] Defendant was released from the City Jail. Thereafter, and until approximately 3:00 p.m. on the 16th day of April, 1955, Defendant made diligent effort to secure the services of counsel to represent

him upon trial. When Defendant did manage to secure such assistance Defendant was unable to furnish such counsel with a copy of the indictment pending against him, the Office of the Clerk of this Court being closed, and the copy of such indictment which was delivered to Defendant being in the possession of Everett W. Hepp, an attorney previously consulted relative to defense.

/s/ HAROLD L. HUTSON.

Subscribed and Sworn to before me this 16th day of April, 1955.

/s/ D. I. GORE, JR.,
Notary Public in and for the
Territory of Alaska.

My commission expires: 3/8/58. [6]

EXHIBIT B

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

George B. McNabb, Jr., being duly sworn upon oath deposes and says:

That he has been employed to represent Defendant in the above-entitled cause; that he was so em-

ployed at approximately 3:00 p.m. April 16, 1955, and that prior to said date he had never discussed the merits of Defendant's case with him or talked to any of the witnesses who will be offered on behalf of Defendant.

That upon such employment Affiant requested from Defendant a copy of the indictment setting forth the charge pending against him and that Defendant was unable to furnish such copy of such indictment.

That upon such short notice Affiant does not believe that he can properly present Defendant's case until he has had opportunity to study the charges against Defendant and to discuss the matter with the witnesses proposed by Defendant.

/s/ GEORGE B. McNABB, JR.

Subscribed and Sworn to before me this 16th day of April, 1955.

/s/ D. I. GORE, JR.,
Notary Public in and for the
Territory of Alaska.

My commission expires: 3/8/58.

[Endorsed]: Filed April 18, 1955. [7]

[Title of District Court and Cause.]

INSTRUCTION TO THE JURY—No 17

[Given]

(17) The offense charged in Count I consists of and in its commission requires the uniting or the joining of the mouth of one person with the sexual organ of another but if you find any penetration however slight it is sufficient. [8]

[Title of District Court and Cause.]

REPORT OF JURY—10:30 P.M., APRIL 19

(At 10:30 p.m., April 19, the jury re-entered the courtroom and the following proceedings were had):

Clerk of Court: Court is reconvened.

The Court: Mr. Gore, I understand you appear as attorney of record for the defendant.

Let the record show the presence of the defendant and his attorney, Mr. Gore. Call the roll of the jury, please?

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

Clerk of Court: They are all present, your Honor.

The Court: Members of the jury, have you reached a verdict?

Mr. Hardenbrook: Your Honor, we are unable

to reach a verdict at this time, and we would like further instructions from the bench and might we have a transcript of the testimony of the witnesses?

The Court: It would require a great deal of time to produce the transcript of the evidence, and that is not considered advisable at this time. The Court feels constrained now in view of the fact that you apparently have not reached an agreement to give you some additional instructions at this time, which the Court shall do. [9]

[Title of District Court and Cause.]

ADDITIONAL INSTRUCTIONS TO THE JURY

This is an important case. In all probability it cannot be tried better or more exhaustively than it has been on either side. It is desirable that you agree upon a verdict or verdicts. The Court does not want any juror to surrender his or her conscientious convictions. Each juror should perform his or her duty conscientiously and honestly and according to the law and the evidence. Although the verdict to which a juror agrees, of course, must be his or her own verdict, the result of his or her own convictions and not a mere acquiesence in the conclusions of other jurors, yet in order to bring twelve minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other.

You should consider that the case at some time must be decided and that you were selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to a jury more intelligent, more impartial or more competent to decide it or that more or clearer evidence will be produced on one side or the other. [10]

In conferring together, you ought to pay proper respect to each others' opinions, with a disposition to be convinced by each others' arguments. On the one hand, if much the larger number of your panel are for conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanctity of the same oath; and, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and to distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their co-jurors.

In so stating, the Court again emphasizes that no juror should surrender his or her conscientious convictions and a verdict arrived at and to which a juror agrees must be his or her own verdict, the

result of his or her own convictions, and not a mere acquiescence in the conclusions of other jurors.

I suggest that you again retire and carefully consider all of the evidence in the light of the Court's instructions, a copy of which you have with you, and I will send a copy of this additional instruction to you, and I am obliged to ask you that you again retire and the court will wait for further message from you.

Dated at Fairbanks, Alaska, this 19th day of April, 1955.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed April 19, 1955. [11]

[Title of District Court and Cause.]

VERDICT

We, the jury duly empaneled and sworn to try the above-entitled cause, do from the law and evidence therein find:

That the defendant, Harold Hutson, is Guilty of the offense with which he has been charged in Count I of the indictment.

Done at Fairbanks, Alaska, this 19th day of April, 1955.

/s/ E. W. HARDENBROOK,
Foreman.

[Endorsed]: Filed and entered April 19, [12] 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury duly empaneled and sworn to try the above-entitled cause, do from the law and evidence therein find:

That the defendant Harold Hutson, is Guilty of the offense with which he has been charged in Count II of the indictment.

Done at Fairbanks, Alaska, this 19th day of April, 1955.

/s/ E. W. HARDENBROOK,
Foreman.

[Endorsed]: Filed and entered April 19, [13] 1955.

In the District Court for the District of Alaska
Fourth Judicial Division

No. 1946—Criminal

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HAROLD HUTSON,
Defendant.

DOCKET ENTRIES

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all of the salient proceedings in this cause, viz:

1955

Jan. 7—File Indictment.

Jan. 12—File and Enter Order to Produce Defendant, 49/242.

Jan. 18—File and Enter Arraignment and Plea, Plead Not Guilty, Bond Fixed at $5,000.00, 49/262.

Apr. 18—File and Enter Trial by Jury, 50/247, 249 and 250.

Apr. 19—Filed and Enter Verdict, Guilty, 50/250.

Apr. 21—Filed Motion for Reduction of Bond.

Apr. 22—Filed and Enter Order Denying Above Motion, 51/10.

May 3—Filed and Enter Sentence, Ten Years on Count I and Two Years on Count II, to Run Concurrently With Sentence in Count I, 50/304.

May 4—File and Enter Order Denying Bail on Appeal, 50/307.

May 5—File and Enter Judgment and Commitment, Count I, Ten Years; Count II, Two Years to Run Concurrently With the Sentence in Count I, 50/316-317.

May 9—File Notice of Appeal (Copy Attached).

Witness my hand and the seal of the above-entitled Court this 9th day of May, 1955.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Harold Hutson, Fairbanks, Alaska.

Name and Address of Appellant's Attorney: George B. McNabb, Jr., 131 Lacey Street, Post Office Box No. 682, Fairbanks, Alaska.

Offense:

Count I: Violation of Section 65-9-10 of Alaska Compiled Laws Annotated, 1949—Sodomy.

Count II. Violation of Section 65-9-11 of Alaska Compiled Laws Annotated, 1949—Contributing to the delinquency of a minor.

Statement of Judgment:

Defendant was tried and convicted on both counts as set forth above. On the 5th day of May, 1955, defendant sentenced to serve a term of 10 years at an institution to be designated by the Attorney General on Count I and a term of two years on Count II, said sentences to run concurrently.

Name of Institution Where Now Confined:

Federal Jail, Fairbanks, Alaska.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated May 9, 1955.

/s/ GEORGE B. McNABB, JR.,
Attorney for Appellant.

[Copy.]

[Endorsed]: Filed May 9, 1955, U.S.D.C.

[Endorsed]: Filed May 12, 1955, U.S.C.A.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant-Appellant states the following points upon which he will rely upon appeal:

1. The trial Court erred in not granting the continuance upon the verified showing made by counsel for defendant that he had first consulted with defendant on the Saturday afternoon prior to the trial date the following Monday morning and that he did not see a copy of the indictment against defendant until fifteen minutes prior to the time set for trial; that he was totally unprepared to proceed with the trial and that defendant's prior attorney had never discussed the merits of the case with defendant or any of defendant's witnesses.

2. The trial Court erred in not granting defendant's request for a continuance of the case until the following morning after the selection of the jury, said selection having taken from the time of commencement of the trial until 1:45 p.m. Said con-

tinuance was requested for the purpose of allowing counsel for defendant to familiarize himself [14] with the case at trial.

3. The trial Court erred in not granting defendant's motion for Judgment of Acquittal made at the close of the Government's case.

(a) There was a fatal variance between the allegations of the indictment and the proof produced by the prosecution.

(b) The testimony of the alleged victim was not corroborated in the slightest particular and there was not the slightest showing of any threats, coercion, use of force or fear so as to take the alleged victim out of the accomplice rule.

(c) From a consideration of the evidence in a light most favorable to the prosecution, there was insufficient proof to establish the fact that there was any unnatural carnal copulation as alleged in the indictment.

4. The trial Court erred in denying defendant's motion for Judgment of Acquittal made at the close of defendant's case.

5. The trial Court erred in granting one of plaintiff's requested instructions, the same being Instruction Number 17.

6. The trial Court erred in the additional instructions given to the Jury at 10:30 p.m., after the Jury reported that it was unable to reach a verdict, in the following [15] particulars:

(a) The instructions did not correctly state the law and were highly prejudicial to defendant. It is evident that the Jury considered such instructions a mandate from the Court to find the defendant guilty, which was promptly done.

(b) The trial Court erred in not giving defendant an opportunity to object to said instructions out of the hearing of the Jury as provided by Rule 30 of the Federal Rules of Criminal Procedure.

(c) The trial Court erred in not giving to the Jury a transcript of the testimony taken at the time of the trial as requested by the Jury, or, in the alternative, declaring a mistrial.

Dated at Fairbanks, Alaska, this 30th day of June, 1955.

/s/ GEORGE B. McNABB, JR.,
Attorney for Defendant-Appellant.

[Copy received.]

[Endorsed]: Filed July 1, 1955. [16]

[Title of District Court and Cause.]

DESIGNATION OF CONTENT OF RECORD ON APPEAL

Defendant-Appellant designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit, the following por-

tions of the record, proceedings and evidence in this action:

1. The indictment.
2. Defendant's motion for continuance filed upon the date of commencement of trial.
3. The entire transcript of testimony taken upon trial.
4. Instruction Number 17.
5. Report of Jury made at 10:30 p.m., on April 19, 1955, said report appearing at pages 112-113 of the typewritten transcript.
6. The additional instructions to the jury.
7. Verdict of Jury.
8. Statement of points on appeal.
9. This designation.

Dated at Fairbanks, Alaska, this 30th day of June, 1955.

/s/ GEORGE B. McNABB, JR.,
Attorney for Defendant-
Appellant.

[Copy Received.]

[Endorsed]: Filed July 1, 1955. [17]

In the District Court for the District of Alaska
Fourth Judicial Division

No. 1946 Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HAROLD HUTSON,

Defendant.

Appearances

THEODORE F. STEVENS,
United States Attorney, and
GEORGE M. YEAGER,
Assistant U. S. Attorney,

Attorneys for Plaintiff.

ROBERT J. McNEALY,
GEORGE B. McNABB, JR., and
T. N. GORE, JR.,

Attorneys for Defendant.

* * *

April 18 and 19, 1955

Be it Remembered, that at 10:00 a.m., upon the 18th day of April, 1955, the trial of this cause, No. 1946 criminal, was begun, plaintiff and defendant represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Court: Are counsel ready to proceed with the United States versus Hutson?

Mr. Stevens: Your Honor, the defendant has

filed a motion which we would ask that the Court consider at this time and also ask that the prospective jurors step out into the hall while we discuss this motion.

The Court: Is the defendant, Harold Hutson, present?

Mr. Hutson: Yes, sir.

The Court: All right, let the record show the presence of the defendant. This motion filed this morning, Mr. Stevens?

The Clerk: Just now. I never have seen it before.

The Court: I see, just presented to you now, Mr. Hall?

The Clerk: That's right, just filed this morning, sir.

The Court: The Court is now ready to hear from counsel.

Mr. Stevens: I believe Mr. McNealy wishes to withdraw from this matter, your Honor. [3*]

Mr. McNealy: With the permission of the Court and at the request of the defendant, your Honor, I would like to withdraw as attorney of record for this defendant. I might state that the defendant saw me at noon Saturday and stated that he wished to employ other counsel, to which I—— (Interrupted.)

The Court: Well, the Court will consider that and rule on it soon, Mr. McNealy.

Mr. McNealy: Thank you.

Mr. Stevens: Your Honor, we oppose this motion for a continuance and call the Court's attention to

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

the fact that Mr. McNabb's associate is now Mr. Gore. Mr. Gore was previously Mr. McNealy's associate. Mr. McNealy, it is true, had probably not consulted with Hutson on this case because Mr. Gore handled it. On the 14th day of April, 1954, Mr. Gore handled the preliminary hearing on this matter as the record of the bind-over will show, and he has represented Mr. Hutson through the proceedings. He is now with Mr. McNabb and the idea that a continuance can be had merely because Mr. McNabb has not seen Mr. Hutson does not meet with the government's approval. Mr. McNabb, as the Court realizes, has been in Juneau with the legislature and if Mr. Hutson wishes to continue with his representation through Mr. Gore's services or through the services of some one other than Mr. McNealy, we believe he should have done so at this time. I call attention to the fact that Mr. McNealy was also in Juneau at the legislature [4] and returned here only recently and for that reason obviously has been unable to contact his client. However, Mr. Hutson was informed of the setting of this trial and also we believe that Mr. Gore is fully familiar with it having handled the preliminary hearing and being Mr. McNabb's associate and being present in court at the present time shows that the continuation of counsel and the awareness of counsel as to what the issues of the case are and being able to properly present the defense, the contention that the motion, that counsel would not be able to do so is without merit and if the Court wishes to call Mrs. Nordale to support our statement, we would be

pleased to do so. We have obviously not been able to prepare a reply to this as it was served on my office at approximately ten o'clock. We think that Mr. Hutson's rights are adequately protected in view of the fact that Mr. McNabb's associate is Mr. Gore, and Mr. Gore is here and Mr. Gore, as anyone will tell you, adequately represented Mr. Hutson in the Commissioner's Court at the preliminary hearing.

The Court: Mr. McNabb.

Mr. McNabb: May it please the Court, it will not be necessary for the Court to disbelieve that Mr. Gore represented this defendant at the preliminary hearing. However, I do not believe that there is necessarily any correlation between the representation that Mr. Gore gave this defendant at the preliminary hearing and the fact that he has [5] now employed me to represent him, I am the one who is responsible for the proper defense of this man and I have accepted employment. The mere fact that there is an employee, employer relationship presently existing between Mr. Gore and myself does not necessarily mean that I am familiar with everything that is in his mind. By the same token that he has in fact interviewed the witnesses that we propose to call, if we can contact them in this matter, I am not charged with that knowledge. I have not contacted them. I saw this man Wednesday, or Saturday afternoon at three o'clock. And about three-thirty I agreed to handle this matter for him. And I asked him then to make a diligent effort Saturday after-

noon and evening and Sunday to contact the various witnesses that I thought might be advisable to call and I made an appointment with him and with his witnesses, those of them that he could find, for eight o'clock last evening in my office. The defendant came there, your Honor, but he did not bring any witnesses with him. This morning when I arrived at my office is the first time that I had had an opportuntiy to see the indictment. I did not even know precisely what I was called upon to defend.

Now, if we have witnesses, if we are able to contact any of them and I made a telephone call last night in an effort to find one, it seems to me in view of the gravity of the charge here today that the interests of justice can only be served by granting me a sufficient length of time in which to at least [6] contact and interview the witnesses that this defendant has recommended that I interview so that I may then be able to determine whether or not their testimony would be of benefit or advantage to the defendant.

It has been manifestly impossible for me to examine either the law or any witnesses and I feel, therefore, that I am totally unprepared to properly defend this man.

The Court: The motion for continuance was filed at ten o'clock this morning, presented to the Court at ten, the very hour that the jury reported here to start the trial of the case. If some extraordinary happening had taken place and a proper showing made to the Court that that extraordinary happening, the Court would not hesitate to grant

the continuance, but that doesn't seem to be the situation here. If there is any reason the defendant has not, is not ready for trial it is because of his own doing. The defendant has known for a long time, having been arraigned January 18th, that his case was going to be tried. The trial of it was delayed because his counsel, Robert J. McNealy, was in the legislature and the Court was pleased to grant the extension of time for that reason and has done that in many cases, in all cases in fact where the defendant has said he is represented by one of the attorneys attending the legislature. I have gone right along with that, and that was done in the case of Mr. Hutson.

Now, his attorney for whom we have delayed the trial is back to represent him. We are ready to go ahead, the [7] case fixed for trial and at the very moment we are ready to proceed the Court is faced with a motion for continuance based only on a substitution of the attorneys that the defendant has decided, and maybe for good reasons, but they are not shown that he wants a different attorney. If the Court should grant a continuance now until the 28th, as requested by the defendant's present counsel, perhaps on the 28th the defendant will decide that he wants a different attorney and make another motion and I don't believe that can be permitted under the law and I don't believe it is necessary under these circumstances. There is no showing to the Court that Mr. McNealy, who was retained originally by this defendant, is not competent to handle the case, no showing that he is not willing to, no

showing at all for the record of any reason for wishing to dispense with the services of Mr. McNealy.

I believe it is for the defendant to determine at this time what attorney or attorneys he wishes to represent him and the trial will proceed. The motion is denied. You will observe that the Court has not released Mr. McNealy as yet. That is a decision for the defendant to make, who he wishes to represent him under these circumstances. If the defendant decides that he wants me to release Mr. McNealy, I will grant Mr. McNealy's motion to be released, but if he wishes to retain the counsel who he has relied on he may do so. [8]

Mr. McNabb: May we then at this time have a five minute or a ten minute recess so we may discuss this matter?

The Court: Certainly. We will take a ten minute recess. It is now seventeen minutes past ten.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 10:17 a.m., the court took a recess until 10:25 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court has reconvened.

The Court: Let the record show the presence of the defendant. The defendant ready to proceed?

Mr. Stevens: Mr. McNabb just stepped out, your Honor.

The Court: Mr. Hall.

The Clerk: Yes, sir.

The Court: Are there any further proceedings to be taken in the absence of the jury?

Mr. McNabb: Yes, your Honor, if I may address the Court for a moment, please.

The Court: Are there any members of the jury panel in the audience. It seems not. Very well.

Mr. McNabb: Your Honor, I submit to the Court that I would never have undertaken the defense of this matter had I not felt that there was good cause for granting of the continuance. I saw a copy of this indictment for the first [9] time this morning at fifteen minutes until ten o'clock, and I would like to have an opportunity to examine the indictment in view of the law and do a bit of research on the problem. I have suggested to Mr. McNealy that he remain in this action with me as defense counsel, as co-counsel, and he has indicated some hesitancy to do that. I think he will address the Court in that regard. I would like at least, your Honor, to be allowed a continuance in this matter until at least two o'clock so that I may examine the indictment. I have asked the defendant if he were represented by counsel at the time he entered a plea, and he has advised me that he was not. It is my present belief that we should move against this indictment, your Honor, but I would have to examine the law before I could determine the merit of such a motion. At any rate, Judge, I will now orally move the Court for a continuance until two o'clock in this matter.

The Court: I am wondering, Mr. McNabb, if per-

haps while you are looking into authorities you could delegate the selection of the jury to someone else.

Mr. McNabb: No. If the Court feels, your Honor, that we should choose the jury now, I would prefer to go ahead and do that. Perhaps that could be accomplished by twelve o'clock or so. That would give us two hours in which to——

The Court: Very well. Will you ask the members of the panel to come in, please. [10]

Mr. McNealy: If it please the Court, at this time I would like to renew my motion and possibly the defendant could make his statement. The defendant called at my office at noon Saturday, or he was waiting in my office when I returned from Court Saturday, and he told me he wished to employ counsel in view of the fact that I had been away, for possible other reasons, and stated in employing other counsel that he felt that he would have to have some indication to other counsel that he was not indebted to me for past services. I represented Mr. Hutson on a couple of occasions prior to this and arranged for bond and other matters of that kind, so I assured him since he definitely wanted other counsel I gave him a paper to the effect that he was not indebted to me; at the time he told me that he didn't have the funds to employ me for the case either and that he thought he could make financial arrangements to employ one other attorney. It is my understanding he has made some arrangements with Mr. McNabb, and I believe with the defendant's statement in Court I should prefer under all the circumstances

not to be connected with the case. In fact I think I would be kind of a fifth wheel.

Mr. Stevens: Your Honor, there are no members of the jury in here, are there? No. This motion of Mr. McNealy's I believe should be granted. This case is connected, although not directly but indirectly with the case which is pending against Mr. Gore, and I believe that in view of that [11] circumstance Mr. McNealy is in an embarrassing position being in between on this case and the case of Mr. Gore, and I believe the Court should release Mr. McNealy.

The Court: Does the defendant have any objection to the release of Mr. McNealy?

Mr. Hutson; No, sir.

The Court: Very well, the motion of Mr. McNealy to be released as counsel for Harold Hutson is at this time granted. Is there anything further to consider before the venire is called in.

Mr. McNabb: No, your Honor.

The Court: Very well.

(Thereupon, the veniremen entered the courtroom.)

The Court: Court is in session. The Clerk at this time will, please, call the roll of the venire.

(Whereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor, except Dolores Clark, Freda Driscoll, Ethel Ennis,

Joe Gannis and Byron Gillam, sir, who was excused. We have thirty-five present, your Honor.

The Court: Mr. Clerk, we will take up the matter of the absentees at the next recess.

The Clerk: Yes, sir.

The Court: Will you now select out of the box twelve jurors, calling one at a time. [12]

(At this time, Mr. Yeager made a brief statement to the veniremen and Mr. McNabb and Mr. Yeager proceeded to impanel a jury.)

(A jury was duly impaneled and sworn to try the above-named cause.)

The Clerk: The remaining jurors will be excused until Wednesday morning at ten o'clock.

Mr. McNabb: May it please the Court, I was going to suggest to the Court, if I may, at this time that we now continue this case until tomorrow morning at ten o'clock. I will not have an opportunity to get into the matters that I discussed with the Court before two o'clock now. I have reason to believe that it will, that one day will be a sufficient amount of time in which to try this case. I think the interests of justice and time of the jury would best be served by starting it tomorrow, if we may.

The Court: Mr. Yeager.

Mr. Yeager: Your Honor, we have brought one witness quite a long ways from his work. I believe the government would like to continue the case if possible at all, at two o'clock.

The Court: Yes, the Court was about to recess

at twelve o'clock and it was defense counsel who suggested that we continue and I will, however, recess until two-fifteen.

Mr. McNabb: Very well, sir.

The Court: Members of the jury, I admonish you now [13] not to discuss this case with anyone and do not permit anyone to discuss it with you and do not listen to any conversation concerning the subject matter of the trial; and of course, do not form or express any opinion until the case is finally submitted to you, and you are excused until two-fifteen, and the court will recess until two o'clock

The Clerk: Court is recessed until two o'clock.

(Thereupon, at 1:45 p.m., a recess was taken until 2:15 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:15 p.m., pursuant to the noon recess.)

The Court: Is the defendant, Mr. Hutson, in the room? Let the record show the presence of Mr. Hutson, and will the attorneys please approach the bench for the record.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury.)

The Court: The Court, of course, doesn't know what evidence is going to be introduced in the trial of this case, but the language of the indictment we

can surmise what it is apt to be. What I am wondering now, and I direct this particularly to the counsel for the defendant, is what attitude if any of the defendant's counsel might have as to the exclusion of juveniles from the courtroom. The Court observes a very young man sitting in the room. Some others might come in. [14]

Mr. McNabb: Judge, so far as I am concerned, I do not know what is proposed to be introduced here, but I would have no objections to excluding every one from the courtroom and I will give the Court my word that in the event of a conviction the question will never be raised on appeal. That is what knocked out the Jelke case, the first one.

The Court: Well, I am wondering, at least as to the exclusion of minors.

Mr. McNabb: I would recommend——

Mr. Stevens: I would recommend that the Court just inform the bailiff to screen the visitors, spectators as they come in the door, find out if they are twenty-one. Otherwise I can see no reason not to allow them in.

Mr. McNabb: I think that as far as that is concerned for the matters of the protection of the very minor accusing witness that it might be embarrassing to her, though I would not know her if I saw her, but I think it would perhaps be a little less difficult on her if all of the witnesses or spectators were excused and it seems to me that I am the only one who could ever raise that issue.

The Court: That's right.

Mr. Stevens: There is also the defendant, Mr.

McNabb. I am not sure that he would be bound completely by you waiving his constitutional rights, if there is such after the Jelke decision. I haven't read it yet myself, but I have [15] heard about it and it seems there was an agreement of counsel on that case.

Mr. McNabb: It makes no difference to me.

Mr. Stevens: Would you move, is that your move that——

Mr. McNabb: I don't know what the Court's attitude is in this. I consent to anything so far as this gallery is concerned.

Mr. Stevens: All right.

The Court: Pursuant to the agreement of the defendant's counsel I now ask Mrs. Wann, the court crier, to approach anyone who appears to be less than twenty-one years of age and ask the person his or her age and if they are under twenty-one, as to that person to, please leave the courtroom and not to return during this trial.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury.)

The Court: Do the parties stipulate that the twelve persons in the jury box are the jurors duly impaneled and sworn to try this case?

Mr. Yeager: The government so stipulates, your Honor.

The Court: Does the defendant stipulate that the twelve persons in the box are the jurors duly impaneled and sworn to try this case? [16]

Mr. McNabb: The defense will, your Honor.

The Court: Very well. You may proceed.

(Thereupon, Mr. Yeager presented his opening statement to the jury.)

Mr. McNabb: Defense waives.

The Court: Very well. Will counsel approach the bench?

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury.)

The Court: It seems the Court is asleep. I usually either obtain a stipulation that a number less than twelve can return a verdict or select an alternate juror, and I didn't do it in this case and perhaps at this time the defendant doesn't wish to so stipulate. I don't want to embarrass the defendant one bit.

Mr. McNabb: We have no objection.

The Court: That a jury of less than twelve might return a verdict in the event of the disability or incapacity of one of the jury?

Mr. McNabb: Not less than eleven.

The Court: Very well then.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury.)

Mr. Yeager: The government will call as their first [17] witness, Virginia, Mead.

VIRGINIA MEAD

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Yeager:

Q. Now, would you state your name to the court and jury, please? A. Virginia Mead.

Q. And how old are you, Virginia?

A. Twelve years old.

Q. And when is your birthday?

A. February 14th.

Q. And do you go to school? A. Yes, sir.

Q. In what grade of school are you?

A. Sixth.

Mr. McNabb: Could you, your Honor, please, could we give her the microphone.

The Court: Very well, and I would like to explain to Virginia, we are going to give you something that will make your voice carry better in the room.

The Clerk: Virginia, you can talk to that, just close or far, just so you can, a little closer than that.

Miss Mead: Like this. [18]

Q. (By Mr. Yeager): Now, Virginia, what grade are you in? A. Sixth.

Q. Do you know what you have just taken when you raised your right hand? A. Yes, sir.

Q. What was that?

A. It is an oath to tell the truth.

Q. And do you know what happens if you do not tell the truth? A. No, sir.

(Testimony of Virginia Mead.)

Q. Have you been taught to tell the truth?

A. Yes, sir.

Mr. McNabb: I object to that.

The Court: Will you ask her if she knows what truth is and what lieing is?

Q. (By Mr. Yeager): Virginia, do you know what the truth is? A. Yes.

Q. And what is that?

A. Well, it is to tell, to tell when something really happened.

Q. And do you know what a falsehood is?

A. Yes.

Q. And what is a falsehood?

A. A lie. [19]

Q. And how old were you on March 20th?

Mr. McNabb: Just a moment now. I am going to object to any further questions until such time as the little girl is properly qualified, until it is fully shown that she understands the obligations of an oath.

The Court: The government may pursue it a little further.

Mr. McNabb: George, ask her if she knows what God is?

Q. (By Mr. Yeager): Did you know beforehand what an oath is? A. Yes.

Q. And who do you swear that oath to?

A. To God.

Q. And do you know who God is? A. Yes.

Q. And who is that?

A. He is the Creator of all mankind.

(Testimony of Virginia Mead.)

Mr. McNabb: I withdraw the objection.

The Court: Very well. Proceed.

Q. (By Mr. Yeager): How old were you on March 28th, 1954? A. Eleven years.

Q. And where did you live on March 28th, 1954?

A. 506, no, I think it was 508 Sixth in Hamilton Acres.

Q. And do you have any neighbors? [20]

Mr. Stevens: Speak up, Mr. Yeager.

Q. (By Mr. Yeager): Do you have any neighbors, Virginia? A. Yes.

Q. Who are those neighbors if you know, please?

Mr. McNabb: Just a moment now, I object to that question on the grounds it has no bearing on the issues of this case.

The Court: Sustained.

Q. (By Mr. Yeager): Do you know the defendant, Harold Hutson, Virginia? A. Yes, sir.,

Q. And did you know him on March 28th, 1954?

A. Yes.

Mr. McNabb: I object to that, move the answer be stricken, no proper foundation is laid for it.

The Court: Overruled.

Q. (By Mr. Yeager): And do you know where Harold was on March 28th, 1954? A. Yes.

Q. Where was Mr. Hutson, Virginia?

A. He was over at our house.

Q. What time was he there, if you know, Virginia? A. I don't know.

Q. Who else was present at that time?

A. Joe Baird. [21]

(Testimony of Virginia Mead.)

Q. And who is Joe Baird?

A. Well, do you mean when this thing happened?

Q. That is correct.

A. Well, no, he wasn't there.

Q. Who wasn't there? A. Joe.

Q. Joe Baird? A. Yes, sir.

Q. Now, when did this thing happen?

Mr. McNabb: Now, just a moment, I am going to object to that as being vague, no bearing on the issues of this case, no proper foundation laid for it.

Mr. Yeager: I will reword the question, your Honor.

The Court: Very well, sustain the objection.

Q. (By Mr. Yeager): Now, were you home on the evening of March 28th, 1954, Virginia?

Mr. McNabb: I am sorry. I didn't understand that question. I couldn't hear you.

Q. (By Mr. Yeager): Were you home on March 28th, 1954? A. Yes.

Q. And what if anything took place that evening? A. Pardon?

Q. What if anything took place that evening?

A. You mean did anything take place? [22]

Mr. McNabb: I am going to object to that question, vague, having no bearing on the issues, no proper foundation.

The Court: I am going to permit her to answer.

Q. (By Mr. Yeager): Will you tell us what happened, please?

(Testimony of Virginia Mead.)

A. Well, I was over at our neighbors, Frank Perry, and I was——

Mr. McNabb: Just a moment, I am going to object to that answer and move that it be stricken on the grounds it is not responsive to the question.

The Court: Overruled.

Q. (By Mr. Yeager): Continue, please.

A. All right. I broke an "E" string and Mr. Hutson said that he would take me down town to get another and I told him I wouldn't go unless Joe came with us, and so Joe came with us and then Joe said that he knew him so Joe had been drinking and we went down town and got the string and then Joe, they got some more whiskey and they were drinking.

Mr. McNabb: Now, just a moment. Excuse me, honey. I am going to object to that entire answer, move that it be stricken on the grounds it is not responsive to the question, has no bearing on the issues involved here, narrative form.

The Court: Of course, the court has in mind the age of the witness, but at the same time I feel counsel, that you can develop the facts even from this twelve year old [23] witness in a little better manner. It may be difficult, Mr. Yeager, but let's try to proceed by more direct questions and answers.

Mr. Yeager: Would the court permit leading questions due to the age?

The Court: To a certain extent and subject to objection. I will give more latitude and leeway to this witness than I would an ordinary witness.

(Testimony of Virginia Mead.)

Q. (By Mr. Yeager): Now, approximately——

Mr. McNabb: Just a moment. For the clarity of the record, your Honor, was my objection to striking that answer on the grounds that I gave sustained?

The Court: Sustained.

Mr. Yeager: Striking the whole testimony, your Honor?

The Court: I would like if counsel can do it to see if this can be unfolded and unfolded in a clearer manner and if that can't be done I may permit far more latitude. I would like to have you attempt it, go back and start up again.

Q. (By Mr. Yeager): Will you state who was present that evening?

A. The whole evening?

Mr. McNabb: I object to that question as being again too vague, having no bearing on the issues of this case, no proper foundation laid for it. [24]

The Court: Overruled and proceed, counsel, and try to bring out if you can, see, the witness has testified to some Joe Baird going along and drinking and let's see if, and that has been stricken. Now, let us see if you cannot establish where they were, what happened, who was there, with this witness.

Mr. Yeager: All right.

Q. (By Mr. Yeager): Now, who was present at your home at that time, that evening on March 28th, 1954?

A. Just Joe Baird, my little sister.

Q. And who else?

(Testimony of Virginia Mead.)

A. No one else. Oh, Harold.

Q. And who do you mean by Harold?

A. Mr. Hutson.

Q. What time was this in the evening, approximately, Virginia?

Mr. McNabb: Just a moment. I couldn't hear you.

Q. (By Mr. Yeager): What time was this approximately that evening, Virginia?

A. I don't know.

Q. Was it in the evening? A. Yes, sir.

Q. Will you state whether or not that night that you left the house? [25]

Mr. McNabb: Just a moment. I am going to object to that as leading and suggestive.

The Court: Overruled.

Miss Mead: Yes, I was.

Mr. McNabb: She was what. I object to that and move that it be stricken on the grounds that it was not responsive.

The Court: Sustained. Are you all right, Virginia?

Miss Mead: Yes, sir.

Q. (By Mr. Yeager): Now, Virginia, when did you see Mr. Hutson on that day?

A. Well, I saw him in the early part of the evening.

Q. And what, if anything, did you do then?

A. Pardon?

Q. What if anything did you do then?

A. We, what do you mean?

(Testimony of Virginia Mead.)

Q. When you saw the defendant, Mr. Hutson?

A. Over at Frank Perry's house.

Mr. McNabb: I am sorry. I couldn't understand the witness, your Honor.

The Court: Do you want her answer read, Mr. McNabb? Mrs. Templeton, will you read the answer?

(Thereupon, the reporter read the answer.)

Q. (By Mr. Yeager): Now, Virginia, will you state whether or not you [26] left Frank Perry's house? A. Yes, I did.

Q. And where did you go from there, if any place?

A. Well, we stopped over at our house to see if Joe was there, and he wasn't there. He was down at the store, and then we went to the music shop and got my "E" string.

Q. And where was that at?

A. That was——

Q. Where was the music shop?

A. Well, it was by the Nordale.

Q. And where did you go, if any place, from there? A. We came back home.

Q. And who was with you then?

A. Harold Hutson and Joe Baird.

Q. And what, if anything, took place after that?

Mr. McNabb: Now, I am going to object to that, your Honor, until the relevancy of the question is established.

The Court: Overruled.

(Testimony of Virginia Mead.)

Miss Mead: What was that question again?

Q. (By Mr. Yeager): What if anything took place after that?

A. Well, Joe had been drinking and he went out to get some, he got pretty drunk and so I went over to Marian Perry's house, and she said I could stay over night there but I was afraid to leave my sister alone.

Q. And did you, will you state whether or not you came [27] back from Perry's house to your own house?

Mr. McNabb: Now, just a minute, I object to that as leading and suggestive, no bearing on the issues.

The Court: Overruled. She may answer.

Miss Mead: Well, I snuck back to my room and I went to bed. My sister came to bed with me.

Q. (By Mr. Yeager): And what happened after you went to bed?

A. Well, Mr. Hutson came in our room.

Q. And what happened then, Virginia?

A. And then he asked me to kiss me, and I said I didn't want to and then he kept telling me to and I kept telling him I didn't want to, and I told him to go home but then Joe Baird was, had gone out to get some more whiskey and he said that he couldn't leave until he got his car back, and so he got mad and he kept telling me to kiss him and then I told him no, and he said he had a gun and he wanted me to put my mouth on his thing.

Q. And what happened then?

(Testimony of Virginia Mead.)

A. And then I did it and then I asked him for a drink of water and thought I might go out the back door, but he wouldn't let me. I never got to, and then I ran out the front door over to Marian's house.

Q. Now, who, what do you mean by Marian's house? A. Marian Perry.

Q. And what do you refer to as "his thing"? [28]

A. His penis.

Q. Will you state whether or not he put that in your mouth? A. He did.

Q. And what did you do after you got to the Perry's house?

A. Well, I was banging on the door and then they let me in and I told them what happened and Mr. Perry went out and he was going to, he had a crowbar and he was real mad and he was going over to Mr. Hutson's house. He lived right next to Mr. Perry.

Q. Now, Virginia, in different parts of your testimony you have referred to an "E" string?

A. That is the highest string on a violin.

Q. And do you play the violin?

A. Yes, sir.

Q. How long have you played the violin?

Mr. McNabb: I am going to object to that as having no bearing on the issues of this case.

The Court: I don't see the materiality, but I will let her answer.

Miss Mead: Well, I have been playing for three years, three school terms.

(Testimony of Virginia Mead.)

Q. (By Mr. Yeager): Now, Virginia, how long were you and Mr. Hutson in your bedroom? [29]

A. I don't know.

Mr. McNabb: Just a moment, I object to that until there is some proper foundation laid for it.

The Court: Overruled.

Miss Mead: Well, I don't know exactly.

Q. (By Mr. Yeager): Well, was it a long period or a short period?

A. Well, it seemed pretty short to me, about twenty minutes. No, not that long.

Mr. Yeager: You may take the witness, Mr. McNabb.

Mr. McNabb: May we have a recess at this time, your Honor?

The Court: Yes. Members of the jury, once again it is my duty to admonish you that you shall not discuss this case with anyone; not permit anyone to discuss it with you; not to listen to any conversation concerning the case now on trial; and do not form or express any opinion until the case is finally submitted to you. Take a ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 3:00 p.m., the court took a recess until 3:10 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court has reconvened.

The Court: Let the record show the presence of the defendant and his counsel. The parties stipulate that the twelve persons in the box are the jurors

(Testimony of Virginia Mead.)

duly impaneled and [30] sworn to try this cause?

Mr. McNabb: The defense will so stipulate.

Mr. Yeager: The government so stipulates, your Honor. May it please the Court, the government at this time would like to have permission to reopen direct to ask a few more questions to clarify.

The Court: Permission granted.

VIRGINIA MEAD

the witness under examination at the time the recess was taken, resumed the stand for further direct examination.

By Mr. Yeager:

Q. Virginia, you talked about Joe Baird?

A. Yes.

Q. Who is Joe Baird?

Mr. McNabb: Just a moment. I am going to object to that as having no bearing on the issues of this case.

The Court: She may answer.

Miss Mead: Well, a long time ago mother was real sick and he called a doctor and he was a good friends of ours and everything and we sort of just adopted him for Uncle Joe.

Q. (By Mr. Yeager): What did he do for you children?

A. Mother went to McKinley Park and he was taking care of us kids.

Q. Now, when this act occurred in your bedroom, was Joe Baird there at that time? [31]

(Testimony of Virginia Mead.)

A. No.

Q. Who was there at that time?

Mr. McNabb: I object to that as having already been gone into. Repetitious.

The Court: It is repetitious, but she may answer.

Miss Mead: Well, just Mr. Hutson, my little sister, and I.

Q. (By Mr. Yeager): How old is your little sister?

Mr. McNabb: I object to that as having no bearing on the issues of this case.

The Court: She may answer.

Miss Mead: She is five years old.

Q. (By Mr. Yeager): Will you state whether or not you did see a gun at that time?

Mr. McNabb: I object to that as being leading and suggestive and having no bearing on the issues of the case.

The Court: She may answer. Overruled.

Miss Mead: Well, I didn't see any gun.

Q. (By Mr. Yeager): When did Mr. Hutson make that statement to you?

Mr. McNabb: Just a minute. I object to that as being vague, indefinite, calling for a conclusion, no proper foundation laid for it, not within the issues.

The Court: Overruled. She may answer. [32]

Miss Mead: Well, he, at first he said it in the bedroom. He, Mr. Perry said that he told him he had a gun, too.

Mr. McNabb: Just a minute, I object to that as hearsay.

(Testimony of Virginia Mead.)

The Court: Sustained.

Mr. McNabb: Move the answer be stricken.

The Court: It will be stricken.

Q. (By Mr. Yeager): Virginia, can you remember what you said to Mr. Hutson in the bedroom? A. No, sir.

Q. You can't remember what you said?

A. No.

Q. Can you remember what Mr. Hutson said to you? A. Well, no.

Q. Will you state whether or not you were afraid when he was in the room?

Mr. McNabb: Just a minute. I object to that as calling for a conclusion, no proper foundation laid for it, not within the issues of this case.

The Court: Overruled.

Miss Mead: Well, I was.

Q. (By Mr. Yeager): And why were you afraid?

Mr. McNabb: Same objection. [33]

The Court: Same ruling.

Miss Mead: Well, I don't know. I am just not used to men coming into our house and doing that.

Q. (By Mr. Yeager): Now, Virginia, where were you when Mr. Hutson put his penis in your mouth? A. We were——

Mr. McNabb: I object to that as being repetitious.

Miss Mead: We were in our living room.

Q. (By Mr. Yeager): And where were you?

(Testimony of Virginia Mead.)

A. We were, I was on the davenport.

Q. And where was Mr. Hutson?

A. He was there, too.

Q. What actually did he do at that time?

Mr. McNabb: Just a minute. I am sorry. Will you, please, read the question.

(Thereupon, the reporter read the question.)

Miss Mead: We were on the davenport.

Q. (By Mr. Yeager): Yes.

A. Well, he made me put his thing in my mouth.

Mr. Yeager: You may take the witness, Mr. McNabb.

Mr. McNabb: We have no questions.

The Clerk: That is all, Virginia.

(Witness excused.) [34]

Mr. Yeager: The government will call Mrs. Perry.

MARIAN W. PERRY

a witness called on behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Yeager:

Q. Will you state your name to the Court and jury, please? A. Marian W. Perry.

Q. And where do you live, Mrs. Perry?

A. 512 Sixth Street, Hamilton Acres.

Q. And where is that located?

A. That is located north of Fairbanks sort of northeast, I believe.

(Testimony of Marian W. Perry.)

Q. And where is Fairbanks located?

A. In Alaska.

Q. And will you state whether or not you were living there on the 28th, on March 28th, 1954?

A. I was.

Q. Will you state whether or not you know a little girl by the name of Virginia Mead?

A. I do.

Q Will you state whether or not you know where she lived at that time?

A. Yes, she lived at, I believe the number was 508 Sixth Street, Hamilton Acres. [35]

Q. Mrs. Perry, I call your attention to March 28th, 1954; will you state whether or not you saw Virginia Mead on that day? A. I did.

Q. And what time, approximately, Mrs. Perry?

A. March 28th was a Sunday, was it not?

Q. Correct.

A. I believe it was about one o'clock in the morning was the first time I saw Virginia.

Q. And where did you see her?

A. She was at my front door.

Q. What was taking place at that time, if anything?

A. Well, I was in bed and asleep, my husband and I, and I was awakened by some loud knocking and some screaming and talking and I got out of bed and ran downstairs to the door and opened it and she came in.

Q. And what was her physical appearance at the time she came in, Mrs. Perry

(Testimony of Marian W. Perry.)

A. Well, she came in, she was barefooted, and she had no outer wraps on, no hat. She was in rather disheveled appearance and she was crying and in a hysterical state of mind.

Q. Will you state whether or not she made a statement to you at that time?

A. Yes, she did. She——

Mr. McNabb: Just a minute now. I am going to [36] object to any further testimony.

Q. (By Mr. Yeager): What was that statement she made to you, Mrs. Perry?

A. She said, "He tried to make me do it and it was awful."

Q. What did you do after that, Mrs. Perry?

A. Well, I believe about this time my husband came downstairs, and——

Q. And what, if anything, did your husband do at that time?

Mr. McNabb: I object to that as being not the best evidence, calling for a conclusion, not within the issues of this case.

The Court: She can state if she knows.

Mr. McNabb: No proper foundation laid for the question.

The Court: She may answer.

Mrs. Perry: What was the question again, please.

Q. (By Mr. Yeager): What, if anything, did your husband do at that time?

A. Well, he came downstairs and he was, in-

(Testimony of Marian W. Perry.)

quired as to what happened. May I state something that I heard when I came downstairs at the time I let Virginia in?

Mr. McNabb: Now, just a minute, I object to any voluntary statement.

The Court: Sustained, and you will proceed by question and answer. [37]

Mr. Yeager: Yes.

Q. (By Mr. Yeager): Will you state whether or not you have anything else to add to your previous question?

Mr. McNabb: Now, just a moment. I object to that as general, vague, not within the issues of this case, attempting to elicit information from the witness without knowing what is, without giving us an opportunity to object to it before he asks a question.

The Court: Sustained, and counsel proceed.

Q. (By Mr. Yeager): I believe previous you testified, Mrs. Perry, that you were coming downstairs, who was present at that time?

A. My husband and children were the only ones in the house when I came downstairs, when I heard the noise and the screaming.

Q. And where was your husband?

A. He was upstairs in bed.

Q. And where were the children?

A. Well, my baby who was six weeks old at the time was sleeping upstairs and my little boy was sleeping downstairs in his bedroom.

(Testimony of Marian W. Perry.)

Q. What, if anything, did you do upon descending the stairs?

A. Well, when I came down the stairs to let Virginia in I heard this man say—— [38]

Mr. McNabb: Just a minute, I object to that as being not responsive to the question.

The Court: She may answer.

Mr. McNabb: He asked what she did.

The Court: Overruled.

Mrs. Perry: I heard this man say, "What do you want to go in and bother them for, honey?"

Mr. McNabb: I object to that and move that the answer be stricken as being not responsive to the question.

The Court: Overruled.

Q. (By Mr. Yeager): Mrs. Perry, did you know Virginia before this particular evening?

A. Yes.

Mr. McNabb: Move the answer be stricken on the grounds it is repetitious.

The Court: Overruled.

Q. (By Mr. Yeager): Do you know her parents?

A. I knew her mother. I know her mother, yes.

Q. Will you state whether or not you knew where her mother was at this time? A. I did.

Q. And where was her mother?

A. Her mother was up at Mt. McKinley.

Q. Mrs. Perry, will you state whether or not you know [39] the defendant, Harold Hutson?

A. I do.

(Testimony of Marian W. Perry.)

Q. Did you know him at that time?

A. Yes.

Q. Did you know where Mr. Hutson lived?

A. Yes, he lived next door to us. I believe the address was 516 Sixth Street.

Q. Will you state whether or not you saw Mr. Hutson that evening?

Mr. McNabb: Just a moment. I am going to object to that until he makes the question more specific.

The Court: Sustained.

Mr. Yeager: You may take the witness, Mr. McNabb.

Mr. McNabb: No questions.

The Clerk: That's all, Mrs. Perry.

(Witness excused.)

Mr. Yeager: Your Honor, things have moved so rapidly here that the government would ask for about twenty minutes until we get the next witness.

The Court: Very well. Members of the jury, once more I admonish you not to discuss the subject of this case with anyone; not to permit anyone to discuss it with you and not to listen to any conversation concerning the subject of this trial; and not to form or express any opinion until the case is finally submitted to you. We will take a twenty-minute recess. [40]

The Clerk: Court is at recess until a quarter till four.

(Thereupon, at 3:25 p.m., the court took a recess until 3:50 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant and his counsel. Do the parties stipulate that the twelve persons in the box are the jurors duly impaneled and sworn to try this case?

Mr. McNabb: We so stipulate, your Honor.

Mr. Stevens: The government so stipulates, your Honor. Call Mr. Perry.

The Court: Very well.

FRANK B. PERRY

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Stevens:

Q. What is your name, please?

A. Frank B. Perry.

Q. Where do you live, Mr. Perry?

A. 512 Hamilton Acres.

Q. What do you do?

A. Well, I am a carpenter by trade.

Q. Do you know Virginia Mead? [41]

A. Yes, I do.

Q. You know Mr. Hutson, the defendant in this case? A. I do.

Q. How long have you known Mr. Hutson?

(Testimony of Frank B. Perry.)

A. Oh, roughly I will say just about a couple of months before this incident came up.

Mr. McNabb: I move that that answer be stricken as having no bearing on the issues of this case.

The Court: Trying to establish the time, I believe it can be done in a more concrete way. I will sustain the objection.

Q. (By Mr. Stevens): Calling your attention to approximately the 28th day of March, 1954, did you know Mr. Hutson at that time?

A. I believe so.

Q. And would you tell us how long you had known him before that time?

A. Well, the wife went into the hospital about the 12th, and Davey, that's my youngest boy, was born about the 13th and that is about the first time I met Hutson.

Q. Of what month? A. Oh, February.

The Court: Establish the year, counsel.

Mr. Stevens: Yes, your Honor.

Q. (By Mr. Stevens): What year was [42] that? A. Well, it was fifty, '54.

Q. Now, Mr. Perry, did you see Virginia Mead on the evening of the 28th of March, 1954?

A. Yes, I believe I did. I believe she was over to the house that day.

Q. Did you see her later on in the evening?

A. No, I didn't.

Q. Were you at home that evening?

A. Yes, I was home all that day, yes.

(Testimony of Frank B. Perry.)

Q. Well, did you see Virginia Mead that evening or early the next morning?

A. Yes, umm-hmm.

Q. And about what time was that?

A. Oh, that is pretty hard to say. It is quite a long ways away from now, but she was over to the house most of the time on account of Davey and she used to come in, run in, well, she would come over there and take care of the kid, run in and out all the time.

Q. Well, do you remember an evening when she came to your house late at night?

Mr. McNabb: Now, I object to that as being leading and suggestive and have no bearing on the issues of this case.

The Court: Overruled.

Mr. McNabb: No proper foundation laid for it.

The Court: It is preliminary and he may [43] answer.

Mr. Perry: Well, I don't know how to answer that one. She used to come over to the house quite a bit and take care of Davey, used to play with her and so forth.

Q. (By Mr. Stevens): Do you remember an evening when Miss Mead came over to your house and you saw Mr. Hutson the same evening?

A. Well, I couldn't very well answer that one because Mr. Hutson came over there several times and Mrs. Mead wasn't over there because as far as I could think of, she never came over to the house while I was there.

(Testimony of Frank B. Perry.)

Q. You don't remember then at this time Miss Mead coming to your house late at night?

A. She never has as far as I can recall.

Q. Do you recall testifying in the Commissioner's Court in connection with Mr. Hutson?

Mr. McNabb: I object to that as having no bearing on the issues of this case.

The Court: He may answer.

Mr. McNabb: Government's witness, leading and suggestive questions, no proper foundation is laid for it.

The Court: He may answer.

Mr. Perry: Well, I don't know how to answer that one.

Q. (By Mr. Stevens): The question is, do you recall testifying in the Commissioner's Court, taking the stand in connection with a [44] case against Mr. Hutson? A. Yes, I can recall that, yes.

Q. Do you remember the evening that was in question downstairs when you were on the stand?

A. Yes, I can recall that.

Q. Now, recalling that evening, do you remember testifying about seeing Miss Mead?

A. Well, Miss Mead wasn't down there, but I recall Virginia being out there.

Q. Well, isn't that the name you know this little girl by, Virginia Mead?

A. That is what I know her by is Virginia Mead, yes.

Q. Now, with that refreshing of your recollection, do you recall Miss Mead coming to your house

(Testimony of Frank B. Perry.)

late at night during that evening of March of 1954?

Mr. McNabb: I object to that as leading and suggestive.

The Court: Overruled. He may answer. You are asked if you recall it.

Mr. Perry: Yes, I recall it, just trying to figure out how to answer that.

Q. (By Mr. Stevens): The answer is yes or no.

A. Yes.

Q. If you recall it, what time was it when she came?

A. Oh, roughly I will say around twelve-thirty or [45] one o'clock in the morning, roughly.

Q. Where were you when she came?

A. I was in bed.

Q. Did you go to the door?

A. The wife got to the door before I did.

Q. How did you happen to go to the door yourself, what made you go to the door?

A. Well, the, we heard this screeching and screaming at the door and naturally the wife being closer to the door than I was, she got up first and she came down there and naturally I was right behind her, not a stich of clothes on, and she opened the door and Virginia come in and she was screeching and hollering and everything.

Q. Now, just a minute. Who was at the door. You just said Virginia Mead, is that correct?

A. That's right.

Q. Was there anyone else there? A. Yes.

(Testimony of Frank B. Perry.)

Q. How do you know there was someone else there? A. Recognized a voice.

Q. Did you hear a voice? A. Yes.

Q. And you state you recognized the voice?

A. Yes.

Q. Whose voice was it?

A. Harold Hutson. [46]

Q. Did you hear what the voice was saying?

A. Yes, sir.

Q. What was said?

A. Said, "What do you want to bother these people for at this time of night for, honey?" exact words.

Q. And what did you do at that time?

A. Well, I was downstairs and I was, oh, just a little bit burned up and told the wife to go upstairs and get my pants and I put on my pants and I grabbed ahold of a crowbar which happened to be next to the door. I happened to be doing a little work around the house previous to that and I grabbed ahold of the bar and ran after Harold and by the time I got over there I kind of cooled off just a little bit.

Q. You went to Mr. Hutson's home?

A. Yes.

Q. Where is that in relation to your home?

A. Next door.

Q. What did you do when you got there?

A. Well, I had the crowbar over my head and was ready to let him have it, and kind of cooled down just a little bit and I also told him, heck, I

(Testimony of Frank B. Perry.)

will let the Highway Patrol take care of you and I turned around and left.

Q. Where was he when you got there?

A. Let's see, five, we lived at 512. I believe it was about 518 Sixth, something like that.

Q. No, where was Mr. Hutson in the house when you got there? [47]

A. He was in bed covered up.

Q. Did you see him in bed?

A. He was in bed.

Q. Did you state you threatened him?

A. I did. I will admit that. I threatened him.

Q. What happened at that time?

A. Nothing.

Q. Did you hit him? A. No, I didn't.

Q. Why didn't you?

Mr. McNabb: Now, just a minute, I object to this entire line of questioning on the ground it has no bearing on the issues of this case, not within the issues.

The Court: He may answer.

Mr. Perry: I would still like to know why I didn't.

Q. (By Mr. Stevens): Did Mr. Hutson say anything to you at that time?

Mr. McNabb: I object to that as not being responsive and move that that answer be stricken.

Mr. Stevens: We will stipulate it may be stricken.

The Court: It may be stricken.

(Testimony of Frank B. Perry.)

Q. (By Mr. Stevens): Did Mr. Hutson say anything to you when you were in this bedroom?

Mr. McNabb: I object to that as having no bearing on the issues of this case. [48]

The Court: He may answer.

Mr. Perry: No, he didn't when you come right down to it.

Q. (By Mr. Stevens): Now, what did you do when you first got to his house?

Mr. McNabb: Same objection.

The Court: Overruled.

Q. (By Mr. Stevens): What did you do when you first got to Mr. Hutson's house, Mr. Perry.

A. Well, I had that crowbar in my hand and he was in bed all covered up, and I had it over my head here just about ready to let him have it and oh, I don't know, I just kind of cooled down, whatever you want to call it. I accused him of it. He didn't deny it, didn't admit to it or anything.

Mr. McNabb: I object to that and move that the answer be stricken on the ground it is not responsive.

The Court: Not responsive. It may be stricken.

Mr. Stevens: The whole answer is stricken, or the part that was not responsive?

The Court: The part that was non-responsive.

Q. (By Mr. Stevens): Now, after you raised this crowbar, did Mr. Hutson say anything to you?

A. No, he didn't. [49]

Q. Did you say anything to Mr. Hutson?

A. Well, yes, I did in a sense of the way. I told

(Testimony of Frank B. Perry.)

him that any man that would pull a stunt like that ought to have his——

Q. Never mind, Mr. Perry.

A. You probably have the idea.

Q. Do you clearly remember everything that went on in Mr. Hutson's house at this time?

A. Well, not all of it. I can just about recall what happened in the house and after the, after he left but I don't know what happened after he left the house. Well, I can't give you no testimony on that.

Q. Would you tell us whether or not you saw Mr. Hutson's clothes anywhere as you entered the room? A. Well, he, he was in bed covered up.

Mr. McNabb: I am going to object to that question as having no bearing on the issues involved in this case.

The Court: He may answer. Overruled.

Q. (By Mr. Stevens): Just answer that question, will you tell us whether or not you saw Mr. Perry's clothes, Mr. Hutson's clothes as you entered that room? That calls for a yes or no answer.

A. I didn't see no clothes, period.

Q. Was there any discussion, will you tell us whether or not there was any discussion which pertained to a gun? A. Yes, yes. [50]

Mr. McNabb: I object to that and move that the answer be stricken as having no bearing on the issues of this case.

The Court: It may stand.

(Testimony of Frank B. Perry.)

Q. (By Mr. Stevens): Who did you have that discussion with?

A. Well, Virginia made a remark that night she made a remark that Harold——

Q. Just a minute. Directing your attention to the time when you were in Mr. Hutson's house, did you hear the mention of a gun? A. Yes.

Q. And who was there in that house at that time?

A. Well, there is, oh, I don't know, they had some roomers in there and they had the bed just about kitty-corner from Harold's bed and he made a remark that if, something about you give me hard trouble or something like that, I have got a 25 automatic under the pillow. That is when I was standing over him with a crowbar.

Q. And who said that? A. Harold did.

Q. Now, what did you do after that?

A. Well, I won't argue with an automatic. I just turned around and went out and called a highway patrol and tell them to come up there.

Mr. Stevens: Your witness, Mr. McNabb. [51]

Mr. McNabb: No questions.

Mr. Stevens: Thank you, Mr. Perry.

The Court: That's all, Mr. Perry.

(Witness executed.)

Mr. Yeager: The government rests, your Honor.

Mr. McNabb: May it please the court, we would like to be heard out of the presence of the jury, if we may, please.

The Court: Certainly. Members of the jury, once more the Court admonishes you not to discuss this case with anyone; not to permit anyone to discuss it with you; not to listen to any conversation concerning the subject of this trial; and not to form or express any opinion until the case is finally submitted to you. You are excused for at least ten minutes and we will send for you when they are ready for you.

(Thereupon, the jury withdrew from the courtroom and the following proceedings were had out of the presence and hearing of the jury):

Mr. McNabb: If it please the Court, it might be advantageous to Court and jury as well as to the defense in this matter if we could present this argument tomorrow at ten o'clock so that we might then be better able to present the authorities. We have had no time, as the Court knows, to thoroughly research this matter. We have done our best to take advantage of the various recesses that we have had. [52]

The Court: Do you suppose you could present it at nine o'clock tomorrow morning?

Mr. McNabb: If it please the Court, I think you have another argument at nine o'clock, your Honor.

The Court: I do.

Mr. Stevens: We would be pleased to contact Mr. Hurley and have that heard this evening, or

else tomorrow if you wish to go ahead at nine o'clock.

The Court: If Mr. Hurley and Mr. Hepp would agree to hear that argument at some other time I would like to hear this argument. I would be willing to give counsel from now until nine o'clock tomorrow morning.

Mr. McNabb: I can suggest to the Court that there is no question whatever of our ability to finish this case tomorrow. The thirty minutes or an hour that it will take on this argument, be it at nine o'clock or ten o'clock would certainly not, as far as I am concerned, throw the Court's calendar out of joint.

The Court: Well, I have in mind that if we hear that argument at ten o'clock tomorrow morning, how long is it going to take to dispose of the argument?

Mr. McNabb: It won't take us more than thirty minutes, Judge, if that long.

The Court: I might ask the jury to report at ten o'clock tomorrow morning, give us a half hour to take care of the argument. [53]

Mr. McNabb: I think fifteen minutes would serve adequately for the defense.

The Court: How many witnesses, if you care to state, Mr. McNabb, do you expect to call for the defense?

Mr. McNabb: Your Honor, as I mentioned this morning, I have had no opportunity to contact any witnesses.

The Court: Well, but you seem to think that we will finish tomorrow.

Mr. McNabb: I would guess that we wouldn't have more than three or four witnesses at the most.

The Court: It becomes quite important that the case be concluded tomorrow if we are going to lose an hour tonight. My only worry was that we do not finish tomorrow.

Mr. Stevens: Having in mind the record here, your Honor, I wish to state for the record that Mr. Gore is still in Court and he has participated with Mr. McNabb as was anticipated and he handled this matter at the preliminary hearing so we believe there has been ample opportunity to ascertain the witnesses. If the defense does not wish to state how many they will call, that is Mr. McNabb's business. But, for the record, Mr. Gore is here. He has handled this matter for over a year for this defendant, and I don't believe the time to locate witnesses is the thing that is putting the trial off.

The Court: The only thing the Court is perturbed about now is losing fifty minutes or an hour today and then [54] not finishing tomorrow. That is my only concern. I would like to allow counsel——

Mr. McNabb: I was wondering if the prosecution could possibly state how many rebuttal witnesses they intend to call.

The Court: I presume that would depend on the witnesses produced by the defense.

Mr. McNabb: I think all of the witnesses have been called whose names appear on the indictment.

It seems to me that the question is rather pertinent. If the government intends to call no further witnesses, I will give the Court my positive assurance there is no reason why this case will not go to the jury by five o'clock tomorrow evening.

Mr. Stevens: If Mr. McNabb would like to tell me who he is going to call and what they are going to testify to, I will tell him whether or not we are going to rebut their testimony, your Honor. We have no objection to a continuance, however.

The Court: Will you send for the jury, please? The Court is going to allow you the time, Mr. McNabb.

Mr. McNabb: Thank you.

(Thereupon, the jury entered the courtroom and the following proceedings were had in the presence and hearing of the jury.)

The Court: Will the parties stipulate that the twelve persons in the box are the jurors duly impaneled and sworn? [55]

Mr. McNabb: We will so stipulate.

Mr. Stevens: The government so stipulates, your Honor.

The Court: Members of the jury, it is thought that we could best conserve the time of the Court and the jury and best serve the rights of the defendant by excusing you now until 10:30 tomorrow morning, and, therefore, I once more admonish you as it is my duty to do that you are not to discuss the facts of this trial with anyone; not to permit anyone to discuss it in your presence; not to talk

to anyone about it, and do not form or express any opinion until the case is finally submitted to you. You are excused until 10:30 tomorrow morning.

The Clerk: Court is adjourned until 9:00 o'clock tomorrow morning.

Be It Remembered, that upon the 19th day of April, 1955, at the hour of 10:00 o'clock a.m., the trial of this cause was resumed, the plaintiff and the defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding.

The Clerk: Court is reconvened.

The Court: Mr. McNabb, before you proceed, I note that it is 10:00 o'clock. Is the defendant present?

Mr. McNabb: Well, I should rather imagine he is in the hall, your Honor. I have seen him this morning. [56]

The Court: You wish to have him present?

Mr. McNabb: No, not on this argument, unless the Court feels it is necessary.

The Court: How does the government feel?

Mr. Stevens: The verdict hasn't been rendered, your Honor. We would ask the presence of the defendant.

The Court: And Mr. McNabb, not wishing to limit your argument, but the Court is highly interested in any authorities that you might have as to whether or not it is your contention supported by authorities that Virginia Mead is an accomplice. That is one of the questions that I would like to have you cover in your argument, and also both the defense and the government to cover whether or not

if she is an accomplice where the corroborating testimony is. Those are the two things that the Court is interested in at this time.

Mr. McNabb: Well, Judge, I think, however, that this motion of ours is—may it please the Court, I would move now that the Court direct the jury to bring in a verdict of acquittal and I submit to the Court the following: I, of course, am not aware as to whether or not the Court has carefully examined the indictment, Count I of which specifically states the following, "that on the 28th day of March, 1954, in the Fourth Judicial Division, District of Alaska, Harold Hutson feloniously had unnatural carnal copulation, by means of the mouth, with another person." Now, may it please the [57] Court, there has been no evidence introduced here whatever of any act on the part of this defendant that would go toward establishing the crime that is alleged here, that is by means of the mouth. I think that the natural import of that language is such that it would require proof of the government to show that this defendant did in fact place his mouth upon the person of the child, the prosecuting witness.

I was able in my search in an effort to determine the precise legal definition of the phrase "by means of" defined in the case of State against Pemberton, 104 Pacific at 556, in which the Court in construing "with," and I place quotation marks around the word "with," "with force and fear, committed the offense, was used as synonymous with 'by,' and equivalent of the expression 'by means of'." As

I said, that is State against Pemberton, 104 Pacific at 556.

What then would the indictment say if we used that judicial construction of the term? It would mean with the mouth, with the mouth. I submit to the Court that there has not been one iota, not one scintilla of evidence introduced here to support the proposition that this defendant placed his mouth upon any part of the anatomy of the female child who is the prosecuting witness for the government. That, your Honor, is the only case that I could find construing the term or the phrase "by means of."

Now, may it please, the Court, I would like to direct the Court's attention to, if the Court feels that that [58] expression, let me say this, if I may, the government may contend that there could be no sexual satisfaction, that is there could be no copulation, and copulation is defined many, many places without exception as sexual satisfaction. The government may contend in anticipation of such an argument that there could be no sexual satisfaction on the part of this defendant if he were to place his mouth upon the person of the child, and I state unequivocally to the Court that that certainly is not true. Anyone who is familiar with the Kinsey Report and many other studies of a similar nature are quite aware that in many instances that a man may have an emission by reason of placing his mouth upon the private parts of the female.

Now, then, the phrase unnatural carnal copulation, I direct the Court's attention to the definition

of the word copulation. Copulation is defined in 18 Corpus Juris Secundum at Page 130 as "the act of gratifying sexual desire." The act of gratifying sexual desire. The gratification, of course, requires emission. In this instance there was no testimony whatever of any emission. It is further defined as the consummation of marriage. By the same token, there is no consummation of marriage without emission. Further it says the word copulation is synonymous with coition, and cites 14 Corpus Juris Secundum at 1315, and at that place, 14 Corpus Juris Secundum 1315 the word coition is defined as, "The act of gratifying the sexual desire, held to be [59] synonymous with 'copulation'," and, as I stated to the Court, copulation previously defined as the consummation of marriage.

Here, your Honor, there was no testimony at all as the Court well knows concerning an emission of this defendant. Now, may it please the Court, I would like further to call the Court's attention to the case of People v. Angier, which has been cited many times, District Court of Appeal, Second District, Division 2, California, decided April 23rd, 1941, and your Honor, if I may have the Court's indulgence, I find that this case is so exceptional that I would like to read a substantial portion of this decision to the Court, if I may, please.

The Court: Very well.

Mr. McNabb: The opinion delivered by Justice Moore, the presiding Justice, and he says, "Appellant was accused by information with a violation of section 288a of the Penal Code. He was tried by

the court without a jury, was convicted and sentenced to San Quentin penitentiary. He appeals from the judgment of conviction and from an order denying his motion for a new trial. He maintains that the verdict and decision are contrary to law and against the evidence."

I am afraid, your Honor, that I have neglected to give the Court the citation of this case, 112 Pacific Second at Page 659. Judge, I don't wish to be——

The Court: I am listening very attentively. [60]

Mr. McNabb: "Abbreviating the lengthy and conflicting stories told by two little girls, aged seven and five, whom we shall refer to as AC and YZ, it is sufficient to recite that they resided in the vicinity of appellant's home and often played around his door; that appellant had a solarium above his garage which was reached by climbing a ladder and through an opening; that about the 30th day of July, 1940, the two children accompanied by AC's sister entered the solarium to play. At the same time appellant was at work in the machine shop of one Johnson, whose premises adjoined those of appellant. The children soon became noisy at their play, whereupon appellant twice left his work, proceeded to the garage, climbed the ladder and requested them to leave. The testimony of AC is that upon appellant's third call he stayed but a minute and that he 'licked' her 'potty' once as she stood near the aperture through which he projected his head in order to communicate with them. YZ testified in substance that appellant 'kissed' AC's 'pee-

wee.' AC's younger sister, aged five, was definitely present on the first two calls made by appellant to the solarium but she was not called to the witness stand. There is no testimony that at any time did appellant enter into the sunroom where the children were at play. At each call he merely stood on the ladder so that his eyes were on a level with a solarium floor. The only proof of a copulation is contained in the foregoing, except that when asked as to the location of her 'potty,' AC pointed, whereupon the district attorney stated: 'She is indicating the crotch.'

"Appellant predicates his appeal upon the claim that the evidence is inadequate to uphold the conviction. He inveighs lengthily against the alleged inconsistencies and discrepancies in the testimonies of the two little girls. But these vices are such as naturally would occur in the narratives of little children concerning a sudden occurrence. However, in view of our construction of the statute the judgment should not prevail.

"(1) The section of the Penal Code under which the information was drawn makes it a felony for a person to participate in the 'act of copulating the mouth of one person with the sexual organ of another.' That section comes under Chapter V of Title IX, s 281, et seq., of the Code, which chapter deals with bigamy, incest and the crime against nature. 'The crime against nature,' as contemplated by the legislature, is the perverted act of uniting the mouth of one participant with the sexual organ of the other with a view of gratifying the sexual

desire. A mere contact of the mouth with the sexual organ of another, either by a 'kissing' or a 'licking,' cannot be construed to mean a copulation. The word copulation has never had the meaning of mere contact. It has always had the significance of the verb 'to couple,' which is an English derivative. It is derived from the Latin copulare, which is translated 'to couple, join, unite, band or tie [62] together.' White's Latin Dictionary, the Latin noun coupla is translated by the lexicographers as 'that which joins together, as a band, tie or leash.' For over three hundred years the English derivative has had no other significance than that of uniting in sevual intercourse.' In Stark's Elementary and for an indefinite past has been the union of the sexes in the generative act. Standard Dictionary. Webster's International Dictionary. The Oxford Dictionary (1893) defines the word thus: 'To unite in sexual intercourse.' In Stark's Elementary Natural History (1828) it is given the same usage. Goldsmith's Natural History (1874) refers to the 'copulating season.' In Quick Dec. Wife's Sister (1703) appears: 'An hainous sin * * * in the brother to have copulated with this widow.' In the King James translation (1611) of Leviticus, 15:16-18, we find that the Mosaic Laws ordained that 'the woman with whom man shall lie with seed of copulation, they shall both bathe,' etc.

"Thus does it appear that since Shakespeare reinforced the static character of the English idiom the word copulate has had primarily an unvarying significance, to wit, the act of gratifying sexual

desire by the union of the sexual organs of two biological entities. This is the meaning of the word wherever found in statutes and decisions." And, may it please the Court, this decision quotes 14 Corpus Juris, 18 Corpus Juris Secundum, Copulation 130; 13 Corpus Juris 933. [63]

"Therefore, the legislature, in framing section 288a of the Penal Code, must have intended to punish only those who participate in an act whereby they are united or joined by the perverted act of one's holding in his mouth the sexual organ of another for the purpose of gratifying their sexual desire. A mere kiss or lick of the private organ, even though lewdly done, is not copulation.

"(2) Indeed, the physical facts disclosed by the record here render practically impossible the occurrence of the act charged."

I submit to the Court that the same thing is true here. "That defendant, without laying his hand upon the child, standing on a ladder leading to a loft where the three girls were at play; standing only sufficiently high for his head to be level with the floor; his employer close at hand expecting his immediate return and a friend nearby awaiting his descent—that under such circumstances he could have developed a purpose to commit an act of sexual perversion does not accord with the universal concept of the psychology of humans who indulge in such practices. A person so addicted, if not surrounded by familiar pals, would have been prompted by his cunning and his fear of apprehen-

sion to seek retreat from the gaze of those whom he knew to be his superiors in the arts of virtue.

"Moreover, conceding the contact of appellant's mouth with some part of the body of the little girl, the [64] evidence herein is not sufficient to establish that he touched her sexual organ. AC's testimony is that he 'licked' her 'potty.' No evidence identified 'potty' as a sexual organ. The nearest approach to such identification was the language of counsel which we above adverted. Such evidence does not measure up to that approach to reasonable moral certainty which the law requires in order to sentence a man for fifteen years in a state's prison. Neither is the testimony of YZ to the effect that appellant 'kissed' the 'pee-wee' of AC proof of an oral copulation of appellant with the sexual organ of AC. YZ's testimony is that AC was sitting on the floor near the aperture into the solarium, and that appellant's head came only to the level of the floor at the time he performed the alleged act. Wherever she sat, obviously it would have been necessary for YZ to have seen through the thigh and clothing of AC or through the head of appellant in order to know what his lips contacted the crotch or the sexual organ of her companion.

"This experience," and I ask the Court to be particularly careful with the following language and to give it great significance. "This experience may become a bitter memory in the lives of these children, but its loathsome phases will not overcome the presumption of innocence that follows the accused or relieve the state of its burden to prove

the crime alleged. That appellant might have been guilty of some reprehensible behavior not named in the [65] accusation, which we do not affirm, is no justification for this conviction. Trials of adults upon charges of sex perversion and kindred crimes growing out of the relations of the accused to little children require the utmost vigilance upon the part of courts at every stage of the consideration of such causes. No charge is more easily made and none is with more difficulty disproved. As recently observed by the Supreme Court: 'As a matter of practical observation to many judges who have presided over trials of this nature, it is plainly recognized that, notwithstanding the salutary rule that an accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt, nevertheless, to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of "guilty"; and that—instead of its being necessary for the prosecution to prove his guilt beyond a reasonable doubt—in order to secure an acquittal of the charge, it becomes incumbent upon the accused to completely establish his innocence, and to accomplish that result not only by a preponderance of the evidence but beyond a reasonable doubt.' People v. Adams, 14 Cal. 2d 154, 167, 93 P. 2d 146, 152."

And the Court further said, "for the reasons suggested we are convinced that the judgment is an

injustice which should be corrected now," and the judgment of the trial court was reversed. [66]

Now, may it please the Court, the only testimony that we have in the record to whether or not there was in fact a copulation is the testimony of this girl that he put his thing in her mouth. There was no testimony whatever of an emission. There is no testimony as to how long she had it in her mouth. In view of this case, it seems to us that the Court should direct a verdict of not guilty. By the same token, your Honor, it is our contention, of course, that the girl is an accomplice. I can hear the prosecution say now she cannot conceivably be an accomplice because she stated that she was afraid. There was testimony about a gun. The little girl did not testify that she ever saw a gun or that she was threatened with a gun, or that she was threatened in any way, any fashion whatever.

There must, your Honor, have been some threat to cause her to become fearful and there is no testimony as to why she was afraid. I think the best that she could do in her testimony was that, I was afraid because I wasn't used to men coming in the house and doing things like that. The only reason why the child could not be, or is not an accomplice is because of an alleged fear, yet there is no statement in the record as to why she was fearful. It is possible that fear may exist without threats, but it is not very easy to suppose there can be fear if there is no compulsion and there was no statement by this witness of any compulsion. [67]

State against Hoffman, 280 Northwestern 357,

"Fear must be induced by threats." State against Anderson, 267 Northwest 121, Page 124, "Fear may be induced by threats either to do an unlawful injury of the person or property of the individual threatened or to any relative of his or member of his family." In re McKay 37 Pacific 1106, "The fear which the law recognizes as an excuse for the perpetration of an offense must proceed from immediate and actual danger threatening the very life of the party. The apprehension of loss of property by waste or fire and even an apprehension of a slight or remote injury furnishes no excuse." United States against Beagle, 2 U. S. Reports at Page 346, "In the total and complete absence of any showing as to why this child was fearful, in the absence of any testimony as to any threats, coercion, use of force, there can be no assumption by this Court that she was placed in fear. If there actually then was no fear by this little girl, then certainly she became an accomplice to the crime. She is over the age of seven years. Our statute provides that our law shall be that of the common law except where altered by statute. If the child is over the age of seven years, then she may be accused or charged with the crime. If she may be charged with the crime she therefore is an accessory. I think those things are elementary, your Honor. If the child is an accomplice there then is a complete and utter failure of any corroborating testimony and our statute likewise [68] provides that an accused shall not be convicted on the uncorroborated testimony of an accomplice. The word corroborated means to

strengthen and the facts must be sufficient and of such probative value as to connect the defendant with the commission of the crime as charged. Hubbard against State, 45 Southeastern, page 798. Corroboration must tend to connect defendant with the perpetration of the crime as charged. Harper against State, 27 Southeastern Second, 233. Corroboration must be evidence from an independent source having some material fact tending to show that the defendant committed the crime. People against Ies, 3 New York Supplement, Page 32 and Page 34. Corroboration must be of a substantial character. Underwood against State, 171 Southwestern Second, 304, at Page 307.

I have a further case or two, your Honor, which I am unable at this time to find, to this extent that the opportunity to have committed a crime or a showing by way of an attempt to corroborate that the person accused had an opportunity to commit a crime is not sufficient corroboration and that is all that there is in this instance, a showing that there may have been an opportunity.

For all the various reasons which I have set forth, we move the Court for a verdict of acquittal.

Mr. Yeager: May it please the Court, Mr. McNabb. The government has charged in the indictment that Harold Hutson feloniously had unnatural carnal copulation by means of [69] the mouth with another person, to wit, Virginia Mead, not by means of his mouth, your Honor, by means of the mouth. The statute wherein this indictment was drawn, that if any person shall commit sodomy or a crime

against nature or shall have unatural carnal copulation by means of the mouth, or otherwise, either with beast or mankind, such person on conviction thereof, shall be, and so forth.

Your Honor, we believe that the defendant was not mislead by this indictment, that he knew the nature of the offense, and he could properly prepare a defense. In 48 American Jurisprudence at Page 551 they state therein, "Where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required. Specifically, however, in charging the crime of sodomy, because of its vile and degrading nature there has been some laxity of the strict rules of pleading."

We cite, your Honor, People v. Battilana, 126 Pacific Second, 923. At page 927 the Court stated, "The fourth count of the indictment reads in part: 'The said defendant * * * on or about the 1st day of August, 1941, did wilfully, unlawfully and feloniously commit the infamous crime against nature by then and there having carnal knowledge of the body of one * * * then and there a female person, in violation of section 286 of the Penal Code of the State of California, a felony.' "

The Court went on further and said, "On account of [70] the degrading nature of the crime of sodomy it is uniformly held that it is not necessary to describe the offense with the same particularity which is required in other crimes. In 8 Ruling Case Law, page 335, section 366, it is said in that regard: '* * * by reason of the vile and degrading nature

of this crime, it has always been an exception to the strict rules requiring great particularity and nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act, and, where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required.' ''

Also, in the case of Tonker v. United States, 178 Federal Reporter, 712, the District of Columbia has as its statute describing and penalizing certain sexual acts and then provides: "And in any indictment for the commission of any of the acts, hereby declared to be offenses, it shall not be necessary to set forth the particular unnatural or perverted sexual practice with the commission of which the defendant may be charged," and the effect of that is that such crimes you do not have to explain with such particularity. Further down on the page, "The indictment followed the statute precisely. It identified the statute alleged to have been violated. The charge, as stated, was that on a certain day and within the District of Columbia appellant 'committed a [71] certain unnatural and perverted sexual practice' with a certain person. Appellant moved to dismiss but did not move for a bill of particulars.

"Appellant says that the indictment was insufficient to satisfy the constitutional requirement that

he be informed of the accusation against him. We think it was sufficient. An indictment must describe the offense with such certainty as that the accused may prepare his defense and also may be protected against another charge for the same offense, but modern practice has been away from prolixity and from details which are unnecessary to the proper function of the indictment. The cases cited in the footnote hereto support the view we take, and we are persuaded particularly by the opinion of Judge Lehman in People v. Bogdanoff, in which opinion Chief Judge Cardozo and Judges Pound and O'Brien concurred.

"The indictment before us plainly apprised the accused of the nature of the offense with which he was charged, and plainly identified that offense. Only details of description were missing, and they were available to him as a matter of right. The utmost of his constitutional right was not and could not be denied him."

There the Court was of the opinion that he could have obtained a bill of particulars and we believe that is analogous to the Federal Rules of Criminal Procedure wherein a bill of particulars is obtainable.

Glover v. State, 101 Northeastern Reporter, [72] 629, that case they, the Court said, "Omitting the formal parts beginning and closing it, the count of the affidavit in question reads as follows: 'Lawrence D. Stevens, being first duly sworn according to law, deposeth and saith that on or about the 19th day of August, 1912, at the county of Howard and state

of Indiana, Otho Glover did then and there unlawfully and feloniously commit the abominable and detestable crime against nature with one (here the name of the pathic is given) and who was then and there a boy eleven years of age." And there they went on, your Honor, to say that "by reason of the vile and degrading nature of this crime, it has always been an exception of the strict rules requiring great particularity and nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act, and, where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood is all that is required."

And also in State v. Langelier, 8 Atlantic Reporter 2d, 897, the Court also went on to explain because of the violent and degrading nature of the crime that great particularity was not necessary, and "a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required."

It says in People v. Hickok, 216 Pacific 2d, 140, at [73] page 145, the Court said, "Cases such as People v. Angier, 44 Cal. App. 2d 417, 112 P. 2d 659 and People v. Coleman, 53 Cal. App. 2d 18, 127 P. 2d 309, are not here applicable. In those cases there was no penetration—here there was an insertion into the mouth beyond the lips. The degree of penetration is a false factor. Any penetration of the

mouth, no matter how slight, constitutes a violation of the section.

And in that case also, your Honor, the girl testified that it didn't go beyond my teeth because my teeth were clamped together, but it was inside of my lips in my mouth.

People v. Ash, 161 Pacific 2d, 415. Page 416, "It is now established that it is not necessary in order to constitute a violation of section 288 of the Penal Code that the defendant touch the naked body of the prosecuting witness, it being sufficient that a lewd or lascivious act is committed upon or with the body, or some part or member thereof, of a child under the age of fourteen years."

In People v. Harris, at 238 Pacific 2d, 156, was the same Court, your Honor, that denied the Angier case, the Court said, "This court was impressed that the mouth of the accused could not have touched the bodies of the children. Such evidence was an indispensable element in the successful prosecution of such crime. On reaching that conclusion we were led into a discussion of the significance of the word 'copulate.' While that discourse was philologically correct it was calculated to lead to the erroneous doctrine that the [74] use of the word in section 288a signifies a legislative intent that an offender of the statute is guilty only when he has committed the repulsive act of sex perversion. Such was not the purpose of the lawmakers or the intention of this court."

Your Honor, I also at this time would like to go back into the point of an accomplice, that this

young girl eleven years of age is an accomplice to this defendant, Mr. Hutson. It is the government's contention, your Honor, that she is not an accomplice which is shown by her testimony and by her actions in this particular case. We, as Mr. McNabb so pointed out, that she testified that she was afraid, also her testimony, she testified he made me put his thing in my mouth. We believe, your Honor, that that certainly shows that there was some force involved. The government does not believe that we have to show, go to great length to go to the amount of force that would be necessary on an eleven-year-old child. In fact there was a mention of a gun and the defendant himself, as testified to by Mr. Perry, that he stated he had a gun under the pillow. And also by the actions of this young girl, your Honor, as testified to by Mrs. Perry and Mr. Perry in that she ran screaming next door and banging on the door to get in and she was crying. To us, your Honor, that certainly don't show that this young girl was an accomplice to the act that the defendant is charged with.

We also believe, your Honor, that the force is not an [75] element of the offense, but take the fact, even if she is an accomplice, your Honor, even assuming by great length that this girl was an accomplice, we still believe that there was corroboration testimony given by Mr. Perry and Mrs. Perry. She went to the house while she was in great shock, crying; she made certain utterances and that Mr. Perry was downstairs immediately, grabbed a crowbar and went over to the home of this defendant

and he found the defendant there in bed. Although his testimony was that he did not see any clothing lying around. We believe, your Honor, and submit to this Court that the indictment is sufficient in that it apprised the defendant of the nature of the crime against him, and we also submit to the Court, your Honor, that the young girl, Virginia Mead, was not an accomplice to this act, but even and by all great imagination and assumption that she was an accomplice we believe that there is supporting testimony and corroborating testimony that this act was committed.

I thank you.

Mr. McNabb: May it please the Court.

The Court: Mr. McNabb.

Mr. McNabb: I have no quarrel with the statement of the government concerning the sufficiency of an indictment in a crime of the horrible nature of sodomy, but the same token, I think that we are in complete accord on what the indictment should say. And Mr. Yeager quoted to the Court several instances in which the Court said the indictment is [76] sufficient if it is "easily understood." Great particularity, and I bracket those words, is not required as is stated in the cases cited to the Court. Great particularity is not. Easily understood is required.

Now, your Honor, it would not have been difficult, in fact it would have been a simple proposition, an exceedingly simple matter, had this indictment been drawn to include either the words his or her

between the words by means of his or her mouth so that it could have been "easily understood."

As I have pointed out to the Court, the only case that I could find on the proposition of a judicial construction by means of said "with," with, and the government has not seen fit to show that I was in error in that regard. With the mouth, by the same token they have not shown that the definition of copulation as set out in the Angier case as I have given it to the Court has been changed, that that is not a true and correct statement of the law as it exists today.

Certainly, your Honor, this jury from the lawful evidence that has been introduced here could at best at this time guess there has not been sufficient proof to associate this defendant with the crime with which he has been charged. The only guess as to his guilt. The government, therefore, your Honor, has failed to establish beyond a reasonable doubt the guilt of this party and we therefore are entitled to a directed verdict. There is no question but that the little girl is an accomplice because there is no showing of fear. [77] She says she was afraid but from the cases that I cited to you, Judge, and they have not come forward to show that those cases are wrong, either, there must be some showing of the force or of the threat or of the coercion, that thing which caused her to be afraid. She cannot state I am afraid, and therefore go excused of any act. Any person who would come before this bar of justice as an accomplice to a crime could say, "I was afraid," and if they didn't substantiate that fear

by some testimony concerning why they were afraid, then the fear that they stated that they had at the time is insufficient. The cases are uniform on that point. There is just no question about it. Here there has been no statement, no evidence, no testimony of this little girl as to why she was afraid. If she was not afraid then there is no question but that she was an accomplice and if she was an accomplice there is an utter want of proof of any corroboration tending to show that this defendant was guilty of the crime with which he is charged.

I found the other cases in prosecution for statutory rape, opportunity may be considered as one of the circumstances, but it is not "corroborating." Now, your Honor, this case is very closely allied with statutory rape. The nature of this crime is for all practical purposes the same as statutory rape. That is Alcorp against State 106 Pacific 2d, 838, opportunity. Now, if there is any corroboration of this little girl's testimony it is in that regard. [78] Opportunity to commit rape is not sufficient corroboration. State against Howard, 297, State against Lahmon, 1 Northwestern 2d, 629. Your Honor, couple these various questions, things that are brought out, whether or not we have any, whether we were placed on notice so that we might defend this thing; whether that indictment is easily understood in the light of present knowledge concerning irregular sex practices; whether the words, by means of, is sufficient to place this man on notice; what is the usual connotation of by means of, by means of his mouth? If they had made it easily understood

they could have increased it say by means of his or her. There is no copulation, no coition. She is an accomplice. There is no showing of fear. There is no corroboration.

For those reasons, your Honor, we feel that the Court should direct a verdict of acquittal.

The Court: The Court at this time will deny the defendant's motion. It is now 11:00 o'clock. We started this hearing at ten minutes after 10:00. The Court asked the jury to report at 10:30. I merely wish to call that to the attention of the record, and we will now take a ten-minutes recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 11:00 a.m., the court took a recess until 11:10 a.m., at which time it reconvened and the trial of this cause was [79] resumed.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant and his counsel, and will the Clerk, please, call the roll of the jury?

(Whereupon, the Clerk of Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: Very well.

Mr. McNabb: Mr. Hutson, you take the stand, please.

HAROLD HUTSON

the defendant, called as a witness in his own behalf, was duly sworn and testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please, sir?

A. Harold L. Hutson.

Q. Mr. Hutson, where did you reside in the month of March, 1954?

A. 516 Sixth, Hamilton Acres.

Q. Do you have any recollection of the night of the 28th day of March, 1954? A. Yes, sir.

Q. Where were you on that night?

A. I, in reference to this particular charge, I was at this particular house. [80]

Q. What particular house?

A. This Mrs. Mead's.

Q. Do you know her full name?

A. Virginia Mead, I believe. The mother is Mrs. Ona Mead, I think.

Q. Mrs. Ona Mead, she does have a daughter, does she? A. Virginia Mead.

Q. Virginia Mead, the little girl who was on the stand yesterday? A. Yes, sir.

Q. How did you happen to be at that residence, Mr. Hutson? A. I was invited in.

Q. By whom were you invited?

A. Mr. Joe Baird.

Q. Do you know where Mr. Baird resided?

A. He lived there with Mrs. Mead.

(Testimony of Harold Hutson.)

Q. He resided in the same residence with Mrs. Mead? A. Yes, sir.

Q. What time of the day were you invited to that residence? A. I don't recall the time.

Q. Well, what is the, in the evening, early evening, at night or?

A. It was in the evening late.

Q. Rather late in the evening? [81]

A. Yes, sir.

Q. And did you then enter the house?

A. Yes, sir.

Q. Who was present then when you entered the home?

A. Mr. Baird, a small child and two girls.

Q. Do you know who the two girls were?

A. This Virginia Mead and her neighbor, the little girl that was their neighbor, lived up the street.

Q. Do you recall what her name was?

A. No, sir, I don't.

Q. And a small child you mentioned?

A. Yes, sir.

Q. Do you know who the child was?

A. It is supposed to be the sister to Virginia Mead.

Mr. McNabb: Will you read that answer, please, mam?

(Thereupon, the reporter read the answer.)

The Clerk: Keep your voice up. We can't hear you.

(Testimony of Harold Hutson.)

Q. (By Mr. McNabb): Do you have any knowledge of how old the child was?

A. I would estimate between four and five.

Q. Now, all of these children up and about, running and playing and the like at that time, or do you—— A. Yes, sir.

Q. And it was what time did you say?

A. I don't recall the exact time. It was late in the evening. [82]

Q. How long did you stay at that residence?

A. I don't have any way of knowing. There wasn't any clock out there.

Q. Did Mr. Baird remain there all the time that you were present?

A. No, sir; he used my truck; said he would be back in ten minutes.

Q. Did you at that time own a truck?

A. No, sir; this truck I had borrowed from my friend that I was living with. It was a borrowed truck.

Q. But had you borrowed it for what length of time?

A. No particular length of time. It is just that I would use it when he didn't want to use it.

Q. And you in turn loaned it to Mr. Baird?

A. Yes, sir.

Q. You then were alone in the house, were you, with all three of these little girls?

A. No, sir. The children came in from playing just about the time he left.

Q. How many children came in?

(Testimony of Harold Hutson.)

A. This Virginia Mead and her little sister.

Q. What transpired then?

A. She went to bed, Virginia Mead went to bed, said it was bedtime and asked me to go home.

Q. How many rooms in that residence, if you recall?

A. I think it is a bedroom, a kitchen, a living room and bath. [83]

Q. Where did Virginia go to go to bed?

A. She went to her bedroom.

Q. What about the little child that you mentioned?

A. I put the little child to bed myself.

Q. Did you undress her? A. No, sir.

Q. Put her in bed with her clothes on?

A. I put her on the bed with her sister.

Q. Was her sister in bed at that time?

A. Yes, sir.

Q. Was she covered or uncovered, or do you recall? A. Covered.

Q. What then did you do?

A. Went to the living room and proceeded to wait for my truck.

Q. How long had Mr. Baird been gone at that time, if you recall?

A. I would say about twenty minutes.

Q. Did you testify that he was expected back shortly or what was your testimony?

A. He said that he would be back in ten minutes.

Q. Did you know at the time that you loaned

(Testimony of Harold Hutson.)

him the truck the extent of the trip that he proposed to take?

A. He supposed, he said it wasn't over a half a mile. He said he would be back in ten minutes.

Q. What then occurred, Mr. Hutson? [84]

A. I sat there, looked through books and in the process of waiting and that ten minutes drew into an hour or so.

Q. During that length of time did you have any conversation with the little girl?

A. Yes; I asked where possibly could he have gone, that I had to have that truck.

Q. Did she know where he could have been?

A. She said that she didn't have any idea where he could have gone to be so long.

Q. Now, did you have any further conversation with her?

A. When I was in the kitchen getting a drink of water somebody came up on the storm porch and I called that to her attention, I said maybe that is Joe now, and she said maybe so, and then whoever it was left. They didn't come into the house and it wasn't Joe. I wasn't satisfied at all because I still hadn't seen no truck.

Q. And how long, do you have any recollection of how long that you were in the house?

A. I would say the time that he and I talked and sat around there until the time that this child ran out of the house about three hours.

Q. Well, now, do you know why the child ran out of the house?

(Testimony of Harold Hutson.)

A. Well, she asked me to go home at different times.

Q. How many times?

A. Three times, three times, and she got up mad because [85] I wouldn't leave. I couldn't. In the first place there wasn't anybody there with the children and in the second place I didn't have my truck. It was borrowed. She was plumb ornery about it, got up, ran by me out the door. I took out after her, tried to catch her. I didn't know whether she had a fit or what, or was just in the heated anger.

Q. Now, do you recall how she was attired at the time that she ran out of the house?

A. She was dressed with the exception of her shoes and coat.

Q. Do you know where she went?

A. She went to Mr. Perry's.

Q. Did you follow her over there?

A. Yes, sir.

Q. Did you have any conversation with her?

A. I asked her what was the matter with her, and she says get away, get away.

Q. You heard this little girl testify concerning some rather reprehensible act which she alleged that you caused her to perform. Did you during the course of that evening touch that little girl?

A. No, sir; I didn't.

Q. Did she touch you?

A. No, sir; had no cause to.

Mr. McNabb: No further questions. [86]

(Testimony of Harold Hutson.)

Mr. Yeager: No questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. McNabb: May it please the Court, now without cross-examination the defendant finds itself in the same position that the prosecution was in yesterday and we ask the Court for a recess. Perhaps it would be wise to take it until 2:00 o'clock, if the Court has no objection.

The Court: You mean, Mr. McNabb, you have other witnesses who aren't available at this time?

Mr. McNabb: That is correct, your Honor.

The Court: It is now 11:25, and, members of the jury, once more it is my duty to admonish you that it is your duty not to discuss this case with anyone; not to permit anyone to discuss it with you; not to listen to any conversation concerning the subject of the trial; and do not form or express any opinion until the case is finally submitted to you. The jury is excused then until 2:00 o'clock.

The Clerk: Court is recessed until 1:30.

(Thereupon, at 11:25 a.m., a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant. [87]

The Clerk: Mr. McNabb just stepped around to my office a second, your Honor. He said he would be right back.

The Court: It is just 2:00 o'clock.

Mr. Yeager: Your Honor, may I file with the Clerk three requested instructions submitted on behalf of the government? Mr. McNabb has been served with a copy, your Honor.

The Court: Very well. Let the record show the presence of the defendant and his counsel. Parties stipulate that the twelve persons in the box are the jurors duly impaneled and sworn to try this case?

Mr. Yeager: The government so stipulates, your Honor.

Mr. McNabb: The defense will so stipulate.

The Court: Very well, and in your absence, Mr. McNabb, the government just filed some requested instructions with the Court.

Mr. McNabb: Yes, your Honor, I have seen them.

The Court: When will you have your instructions for the Court? I would like to have them as soon as possible, and by 4:00 o'clock.

Mr. McNabb: By 4:00 o'clock? Did I understand the Court correctly, sir, you say by 4:00 o'clock?

The Court: Yes.

Mr. McNabb: We will have them by that [88] time.

The Court: You may proceed.

Mr. McNabb: The defense rests, your Honor.

Mr. Yeager: The government rests, your Honor.

The Court: Very well.

Mr. McNabb: If the Court please, I would like to be heard again out of the presence of the jury.

The Court: Yes, and in view of the resting the Court will want requested instructions before 4:00 o'clock. I assumed we were going on, and, members of the jury, once more I admonish you that it is your duty not to discuss the facts of this case with anyone; do not permit anyone to discuss them with you, and do not listen to any conversation concerning the subject of this trial and do not form or express any opinion until the case is finally submitted to you, and you are excused and we will call you back, I think in ten or fifteen minutes.

(Thereupon, the jury withdrew and the following proceedings were had out of the presence and hearing of the jury.)

The Court: Mr. McNabb, do you have any requested instructions prepared at this time?

Mr. McNabb: I do not, Judge, but we are in the process, sir, of, we will have only one. It should take only a short length of time to get it prepared.

The Court: Very well.

Mr. McNabb: At this time, your Honor, I should again [89] like to renew our motion for a directed verdict and on the same lines and in the same authority as we directed to the Court's attention earlier in the day.

In addition, however, I think the Court should take into consideration the fact that the government did not choose to call any witnesses to contradict

any of the testimony of the defendant in this action, and that his testimony therefore must be taken as true. The government by the same token did not see fit to cross-examine him and I think therefore his testimony is entitled to a bit greater weight than otherwise would be true.

I think, if it please the Court, that our statement of the law as we addressed it to the Court this morning is certainly sufficient basis upon which this Court can direct a verdict, that the government as yet has failed in any of the particulars to introduce a sufficient amount of testimony that this jury can use to reasonably find that this defendant is guilty beyond a reasonable doubt, that duty which is, of course, upon the government. They have not, as we see it, sustained their duty to introduce a sufficient amount of proof to get over that burden.

Now, Judge, I think that the principal thing in reference to this indictment, the principal question is, which was stated quite adequately and distinctly by Mr. Yeager this morning, whether the indictment and the language in which it is drawn is easily understood, and I submit to the Court in [90] the light of common knowledge that it is not easily understood. It is impossible for the average jurist, who has far more knowledge, technical knowledge particularly, than that of a common layman, the defendant in this case, to ascertain that thing with which he has been charged, that is, is he charged with placing his mouth upon the person of the child or is he charged with forcing her to place her mouth upon him? That situation could have been easily

overcome by including in that indictment the word, his or her. By the same token, copulation coition, I have given the Court ample and adequate authority as to the meaning of those two terms. The case which we cited to the Court this morning is quite clear in that regard. The only testimony was that he required, or forced her or made her put his thing in her mouth. I think it is quite obvious that that is not sufficient or at least it seems so to me in the light of the case which I cited to the Court this morning.

By the same token, I want the Court to consider very carefully whether or not this little girl is an accomplice and in that regard, the Court need address itself only to the problem of whether or not there was a sufficient amount of fear established in this little girl's mind. On that score, the Court is in no position to guess. The decisions are quite clear on that matter, that there must be some threat, some intimidation, some coercion. There is no statement in the record other than her own conclusion, her own statement that [91] she was afraid. If there is not a sufficient basis in the record to establish fear in the mind of that child, then certainly, your Honor, she forthwith immediately becomes an accomplice to this act because she is of sufficient age to be charged as an accomplice, or as a principal in this act, and if in fact she is a principal or if in fact she is an accomplice, then it goes without question and the cases that I cited to the Court this morning, there is no corroboration here sufficient to justify a conviction.

On the basis of those reasons, your Honor, I move the Court again for a directed verdict of acquittal.

The Court: The Court believes that the government has made out a case to be submitted to the jury, and, therefore, denies defendant's motion.

Mr. McNabb: Your Honor, may we have about fifteen minutes to get up this requested instructions of ours, sir.

The Court: Certainly, and how much time do you want to argue, Mr. McNabb?

Mr. McNabb: Oh, perhaps forty-five minutes, absolute maximum.

The Court: The government?

Mr. Yeager: That is plenty long, your Honor. I believe we could do it in a much shorter period of time.

The Court: Very well. We will recess until 2:30; would that be enough time?

Mr. McNabb: Yes, that is sufficient length of time. [92]

The Clerk: Court is at recess until 2:30.

(Thereupon, at 2:15 p.m., the court took a recess until 2:50 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Clerk: Court has reconvened.

The Court: Will counsel, please, approach the bench.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury.)

The Court: The government has been served with six requested instructions by the defendant?

Mr. Yeager: Yes, your Honor.

The Court: The government have any objections to any or all of the instructions?

Mr. Yeager: Your Honor, we, as to Defendant's Requested Instruction No. 2, we don't believe that that is a correct definition of copulation defined to be the law; and we object to Defendant's Requested Instruction No. 3 as not being correct law; and Defendant's Requested Instruction No. 4, not to be material in this case.

The Court: The defense has been served with copies of three requested instructions by the government?

Mr. McNabb: Your Honor, these instructions of the government are not numbered so I did not know how to—— [93]

The Court: I noticed the same difficulty. I might then state that the Court intends to include Government's Requested Instruction——

Mr. McNabb: Based upon a particular case perhaps, Judge?

The Court: Very well, People v. Calkens.

Mr. McNabb: We have no objection to it.

The Court: The Court refuses Plaintiff's Requested Instruction People v. Russell for the reason that there has been no evidence of consent in this case and the Court intends to give Plaintiff's Requested Instruction, People v. Hickok.

Mr. McNabb: To which the defense objects on the grounds that it is at variance with the indict-

ment, the further ground that it is vague and indefinite and is not a correct statement of the existing law.

The Court: The Court refuses Defendant's Requested Instruction No. 1 for the reason that the instruction is included sufficiently in the Court's instructions; and the Court refuses Defendant's Requested Instructions Nos. 2 to 6, inclusive, for the reason that they are either included or in the Court's opinion do not state the law applicable to the case at bar.

And gentlemen, my main purpose in calling you here at this time was so that I could make that record and inform you before I gave you each a copy of the instructions. Now, [94] you will want an opportunity to read them before you argue or maybe the government won't. You may if you want to take ten minutes. We will take ten minutes more on it.

Mr. McNabb: I would rather like to run through these if I may.

The Court: We will take ten minutes more. I haven't assembled the jury yet anyway.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury.)

The Court: We will take a ten-minute recess.

The Clerk: Court is at recess for ten minutes.

(Thereupon, at 3:00 p.m., the court took a recess until 3:10 p.m., at which time it reconvened and the trial of the cause was resumed.)

The Clerk: Court is reconvened.

The Court: Let the record show the presence of the defendant and his counsel, and the parties wish to stipulate that the twelve persons in the box are the jurors duly impanelled and sworn to try this case.

Mr. McNabb: The defense will so stipulate, your Honor.

Mr. Yeager: The government so stipulates.

The Court: Very well.

Mr. McNabb: I would like to approach the bench if I may, your Honor. [95]

The Court: Very well.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury):

Mr. McNabb: May it please the Court, I would like to object to the instruction on Page 7 as follows: "If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence you should do so, and in that case find the particular defendant not guilty." Now, that is a statement, that is a negative statement, your Honor. If there is any, it is incumbent upon the prosecution to prove to this jury beyond a reasonable doubt that the defendant is in fact guilty and by this negative statement is definitely, I feel, prejudicial and not a correct statement of the law. This requires a finding on the part of the jury that they from the evidence that the defendant is not guilty. Now, it requires a positive finding on

the part of the jury that the defendant is in fact guilty and I therefore object most strenuously to that particular instruction.

The Court: The Court, of course, feels that that is very favorable to the defendant, but will certainly consider deleting it if the defendant takes exception to that particular clause.

Mr. McNabb: Well, this requires a positive finding which is not required. It takes a positive finding on the part of the jury that the defendant is in fact guilty of a [96] crime and they do not have to search about for some fashion in which to find him innocent.

The Court: As the Court says, I am not trying to force counsel to agree with me, but that seemed very favorable to me to the defendant, that particular instruction. Does the government have any objection to deleting that?

Mr. Yeager: No, your Honor.

The Court: The Court shall delete it upon the special urgency of the request, of the exception taken by the defendant.

Mr. McNabb: And likewise as to the entirety of Instruction 19 which I feel is not material to this case.

The Court: I am glad to discuss that with counsel. What is the government's attitude on 19?

Mr. McNabb: There is no charge apparently that the child violated any law. If there is such it wasn't in issue at this case or this trial.

The Court: That again the Court felt was favor-

able to the defendant, but if the defendant wishes it deleted and the government has no objection we will delete it also.

Mr. Yeager: We have no objection.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury):

(Thereupon, Mr. Yeager presented a closing argument to the jury in behalf of the plaintiff.) [97]

(Thereupon, Mr. McNabb presented a closing argument to the jury in behalf of the defendant.)

(Thereupon, Mr. Stevens presented a rebuttal argument to the jury in behalf of the plaintiff.)

The Court: Members of the jury, once more I admonish you not to discuss this case with anyone, not to permit anyone to discuss it with you, and not to listen to any subject concerning, or any conversation concerning the subject of the trial, and do not form or express any opinion until the case is finally submitted to you. We will take a ten minute recess after which I will instruct you.

The Clerk: Court is recessed for ten minutes.

(Thereupon, at 4:00 p.m., the court took a recess until 4:10 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Let the record show the presence of the defendant and his counsel. Do the parties wish to stipulate that the twelve persons in the box are the jurors duly impaneled and sworn to try this case?

Mr. McNabb: The defense will so stipulate, your Honor.

Mr. Yeager: The government so stipulates, your Honor.

(At this time, the Court read the instructions to the jury as follows): [98]

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to try the issues of fact that are presented by the allegations in the indictment filed in this court and the defendant's plea of "not guilty." This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice against him. You must not suffer yourselves to be biased against the defendant because of the fact that he has been arrested for this offense, or because an indictment has been filed against him, or because he has been brought before the court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to

infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the United States and the defendant have a right to demand and they do demand and expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict, [99] regardless of what the consequences of such verdict may be. That verdict must express the individual opinion of each juror.

(2) You are the exclusive judges of the facts and of the effect and value of the evidence, but you must determine the facts from the evidence produced here in court. If any evidence was admitted and afterwards was ordered by me to be stricken out, you must disregard entirely the matter thus stricken, and if any counsel intimated by any of his questions that certain hinted facts were, or were not, true, you must disregard any such intimation, and must not draw any inference from it. As to any statement made by counsel in your presence concerning the facts in the case, you must not regard such a statement as evidence; provided, however, that if counsel for both parties have stipulated to any fact, you are to regard that fact as being conclusively proved; and if, in the trial, either party has ad-

mitted a fact to be true, such admission may be considered by you as evidence in the case.

(3) At times throughout the trial the court has been called upon to pass on the question whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence [100] that has been rejected by the court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

(4) The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates, but rather judges. The final test of the quality of your service will lie in the verdict which you return to the court, not in the opinions any of you may hold as you retire. Have in mind that you

will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the court reminds you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

(5) The prosecution and the defendant both are entitled to the indicidual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to determine, if possible, the question of the guilt or innocence of the defendant. When you have reached a conclusion in that [101] respect, you should not change it merely because one or more or all of your fellow jurors may have come to a different conclusion or merely to bring about a unanimous verdict. However, each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he unhesitatingly should abandon that original opinion and render his verdict according to his final decision.

(6) In arriving at a verdict in this case the subject of penalty or punishment is not to be discussed or considered by you, as that matter is one that lies solely with the court and must not in any way affect your decision as to the innocence or guilt of the defendant.

(7) If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be in-

ferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

(8) The court has endeavored to give you instructions embodying all rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability [102] of some of these instructions will depend upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the court that the instruction will be necessary or as to what the facts are. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

(9) The jury are the sole and exclusive judges of the effect and value of evidence addressed to them them and of the credibility of the witnesses. The character of witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. The presumption, however, may be repelled by the manner in which he testified; his interest in the case, if any, or his bias or prejudice, if

any, against one or any of the parties; by the character of his testimony; or by evidence affecting his general reputation for truth, or that his moral character is such as to render him unworthy of belief; a witness may be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial; and by proof that he has been convicted of a crime. [103]

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his or her testimony is completely deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict.

(10) If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him on that point.

(11) You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce [104] conviction in your mind, as against the declarations of a lesser number of a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

(12) Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, if adequately convincing, juries may lawfully find an accused guilty of crime. One is direct evidence and the other is circumstantial. Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his own physical senses, perceived any of the conduct constituting the crime, and which testi-

mony relates what thus was perceived. All other evidence admitted in the trial is circumstantial, and insofar as it shows any acts, declarations, conditions or other circumstances tending to prove a crime in question, or tending to connect the defendant with the commission of such a crime, it may be considered by you in arriving at a verdict. The law makes no distinction between circumstantial evidence and direct evidence as to the degree [105] of proof required for conviction, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof. Either will support a verdict of guilty if it carries the convincing quality required by law, as stated in my instructions.

(13) The law does not require any defendant to prove his innocence, which in many cases, might be impossible, but, on the contrary, the law requires the prosecution to establish his guilt by legal evidence and beyond a reasonable doubt.

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure. It is an essential, substantial part of the law and is binding on you in this case.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the prosecution to convince you of the truth of the charge, you can candidly say that you are not satisfied of a de-

fendant's guilt, then you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of a defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible [106] doubt, because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(14) Each count set forth in the indictment charges a separate and distinct offense. You must consider the evidence applicable to each alleged offense as though it were the only accusation before you for consideration, and you must state your finding as to each count in a separate verdict, uninfluenced by the mere fact that your verdict as to any other count or counts is in favor of, or against, the defendant. He may be convicted or acquitted upon either or both of the offenses charged, depending upon the evidence and the weight you give to it, under the court's instructions.

(15) Count I of the indictment charges that the defendant feloniously had unnatural carnal copulation, by means of the mouth, with Virginia Mead.

(16) Any person who has unnatural carnal copulation by means of the mouth, with mankind of either sex, shall be guilty of a crime.

(17) The offense charged in Count I consists of and in its commission requires the uniting or the joining of the mouth of one person with the sexual organ of another but if you find any penetration however slight it is sufficient. [107]

(18) Count II of the indictment charges that the defendant, as a part of the same transaction set forth in Count I of the indictment, feloniously persuaded Virginia Mead, a child under the age of 18 years, to participate in an act of unnatural carnal copulation by means of the mouth, which act manifestly tended to cause Virginia Mead to become a delinquent child.

(19) Any person who shall by threats, command or persuasion, endeavor to induce any child to do or perform any act or follow any course of conduct which would cause such child to beome a delinquent child is guilty of the crime of contributing to the delinquency of a child.

(20) You are instructed that the plaintiff need not show that the minor, Virginia Mead, is in fact a delinquent child, for it is sufficient if the prosecution proves the commission of the acts alleged in the Indictment, which would tend to cause said minor to become delinquent.

(21) Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and who

will sign the verdict to which you agree. In order to return a verdict it is necessary that all twelve of the jurors agree to the decision. When you agree upon a verdict as to a count of the indictment you are to insert the words "guilty" or "not guilty," as the case may be, into the verdict form which has been prepared by the Court, and then have it signed and dated by your foreman. [108] When you have reached a verdict as to each count of the indictment you are to return with your verdicts to this room.

Dated at Fairbanks, Alaska, this 19th day of April, 1955.

/s/ VERNON D. FORBES,
District Judge.

(At the conclusion of the court reading the instructions to the jury, the following proceedings were had):

The Court: Will counsel, please, approach the bench.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury):

Mr. Yeager: Your Honor, I noticed a typographical error, Virginia Mead instead of Virginia Mean.

The Court: The Court will correct that, and do you want me to announce the correction to the jury or merely correct it?

Mr. McNabb: It is not important.

The Court: What page is that?

Mr. Yeager: Page 8, your Honor.

The Court: Do you have any exceptions other than heretofore urged?

Mr. McNabb: The Court's oral recitation of the instructions did not conform to the instructions as they were presented to us. [109]

The Court: Do you know what the variance was, Mr. McNabb?

Mr. McNabb: Judge, there were four or five of them.

The Court: It might take a little while, it is true, but I discovered some little things after I gave you the copies and I will now point them out specifically. On Page 4, I inserted the words "the character of the witnesses."

Mr. McNabb: That was the only one, Judge?

The Court: No, that was one. And on Page 5, the Court, this is in line, between line five and six, the Court inserted the words "or his biased or prejudice, if any," and just now the government having called my attention to the mis-spelling of the surname of Virginia Mead and changed the "n" to "d" in paragraph 15. Those are the only changes.

Mr. McNabb: May I see that, Judge?

The Court: Yes.

Mr. Yeager: Your Honor, the next paragraph, paragraph 17, typographical error in there, should be a "d" instead of an "n" also.

Mr. McNabb: That is not material.

The Court: Page 8. At this time the Court is

again ink-changing the word, the name "Mean" to "Mead," changing the "n" to a "d."

Mr. McNabb: Your Honor, I am objecting at this time to the instructions in that I feel that they are not sufficient [110] in that they do not entirely instruct the jury as regards every aspect of this case, particularly in view of the motion which I made this morning in regard to the possibility of the prosecuting witness being an accomplice, the possibility, or the credit to be given to spontaneous utterances, those two things in particular I conceive of at the moment at which there is no instruction whatever.

The Court: You wish to confer with Mr. Gore, possibly; you have any further exceptions?

Mr. McNabb: That is sufficient, Judge.

The Court: Does the government have anything further?

Mr. Yeager: No.

The Court: Very well.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury):

The Court: Will the Clerk at this time qualify the bailiffs and administer the oath.

(Thereupon, the Clerk of the Court proceeded to qualify the bailiffs and administer the oath.)

The Court: Very well. The jury may retire now for deliberation.

(At 4:35 p.m., the jury in charge of its sworn bailiffs, retired to enter upon its deliberations.)

The Court: Gentlemen, I wouldn't ask it in the presence of the jury, but do you wish to stipulate that the [111] reporter need not be present when the verdict is returned?

Mr. McNabb: The defense is willing, your Honor.

Mr. Yeager: The government is willing, your Honor.

The Court: Very well.

The Clerk: Court is adjourned until nine o'clock tomorrow morning subject to the return of this jury now deliberating.

(At 10:30 p.m., April 19, the jury re-entered the courtroom and the following proceedings were had):

The Clerk: Court is reconvened.

The Court: Mr. Gore, I understand you appear as attorney of record for the defendant.

Let the record show the presence of the defendant and his attorney, Mr. Gore. Call the roll of the jury, please.

(Thereupon, the Clerk of the Court proceeded to call the roll of the jury.)

The Clerk: They are all present, your Honor.

The Court: Members of the jury, have you reached a verdict?

Mr. Hardenbrook: Your Honor, we are unable to reach a verdict at this time, and we would like fur-

ther instructions from the bench and might we have a transcript of the testimony of the witnesses.

The Court: It would require a great deal of time to produce the transcript of the evidence, and that is not [112] considered advisable at this time. The Court feels constrained now in view of the fact that you apparently have not reached an agreement to give you some additional instructions at this time, which the Court shall do.

(Thereupon, the Court read an additional instruction to the jury as follows):

ADDITIONAL INSTRUCTIONS TO THE JURY

This is an important case. In all probability it cannot be tried better or more exhaustively than it has been on either side. It is desirable that you agree upon a verdict or verdicts. The Court does not want any juror to surrender his or her conscientious convictions. Each juror should perform his or her duty conscientiously and honestly and according to the law and the evidence. Although the verdict to which a juror agrees, of course, must be his or her own verdict, the result of his or her own convictions and not a mere acquiesence in the conclusions of other jurors, yet in order to bring twelve minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other.

You should consider that the case at some time must be decided and that you were selected in the

same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be [113] submitted to a jury more intelligent, more impartial or more competent to decide it or that more or clearer evidence will be produced on one side or the other.

In conferring together, you ought to pay proper respect to each others' opinions, with a disposition to be convinced by each others' arguments. On the one hand, if much the larger number of your panel are for conviction, a dissenting juror should consider whether a doubt in his or her own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, who have heard the same evidence with the same attention, with an equal desire to arrive at the truth and under the sanctity of the same oath; and, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and to distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their co-jurors.

In so stating, the Court again emphasizes that no juror should surrender his or her conscientious convictions and a verdict arrived at and to which a juror agrees must be his or her own verdict, the result of his or her own conviction, and not a mere acquiescence in the conclusions of other [114] jurors.

I suggest that you again retire and carefully consider all of the evidence in the light of the Court's instructions, a copy of which you have with you, and I will send a copy of this additional instruction to you, and I am obliged to ask you that you again retire and the court will wait for further message from you.

Dated at Fairbanks, Alaska, this 19th day of April, 1955.

/s/ VERNON D. FORBES,
District Judge.

(At 10:45 p.m., the jury in charge of its sworn bailiffs, retired to enter upon its further deliberations.) [115]

Reporter's Certificate

United States of America,
Territory of Alaska—ss.

I, Mary F. Templeton, official court reporter for the District Court, District of Alaska, Fourth Judicial Division, Fairbanks, Alaska, do hereby certify:

That I was the official court reporter for the above-named Court on April 18 and 19, 1955, the dates upon which the cause of United States of America v. Harold Hutson, No. 1946 criminal, was heard.

That I recorded in shorthand all of the oral proceedings had in open court upon said dates.

That the foregoing pages, numbered 1 to 115, inclusive, are a full, true, complete and accurate transcript from my original shorthand notes.

Dated at Fairbanks, Alaska, this 18th day of May, 1955.

/s/ MARY F. TEMPLETON.

Subscribed and sworn to before me this 18th day of May, 1955.

[Seal] /s/ JOHN B. HALL,
Clerk of Court. [116]

[Title of District Court and Cause.]

AFFIDAVIT OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the proceedings listed below comprise all proceedings listed by the defendant and appellant on his Designation of Record on Appeal in this cause, viz:

1—Indictment.
2—Motion for Continuance With Affidavits.
3—Instruction of the Court No. 17.
4—Report of the Jury made at 10:30 p.m., April 19.
5—Additional Instructions to the Jury.
6—Verdict as to Count I of Indictment.
7—Verdict of Jury as to Count II.

8—Statement of Points on Appeal.

9—Designation of Content of Record on Appeal.

10—Transcript of Record of Trial and Proceedings, Separately Bound.

Witness my hand and the seal of the above-entitled Court, this 1st day of July, 1955.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 14810. United States Court of Appeals for the Ninth Circuit. Harold Hutson, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Fourth Division.

Filed July 5, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.